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RECORD, CASE No. 14,193.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 207.

JOHN A. BUCKSTAFF AND JOHN UTT, PLAINTIFFS IN ERROR,

vs.

RUSSELL & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED SEPTEMBER 30, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 25, 1893.

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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, within the eighth judicial circuit, sitting in the circuit court of the United States for said district of Nebraska, at the term of January, A. D. 1890.

Be it remembered that on the 25th day of April, 1889, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

Circuit Court of the United States, District of Nebraska.

RUSSELL & COMPANY, Plaintiff,
vs.
J. A. BUCKSTAFF & J. E. UTT, Def'ts. } Petition.

First Cause of Action.

Now comes the plaintiff and for cause of action says that it is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and is a resident and citizen of Massillon, State of Ohio; that the defendants are residents of the city of Lincoln and citizens of the State of Nebraska; that the amount in controversy in this suit, exclusive of interest and costs, is more than two thousand dollars.

Plaintiff alleges that on the 22nd day of June, 1888, this plaintiff sold to the defendants on board the cars at Lincoln, Nebraska, goods, wares, merchandise, and machinery; that said contract of sale between the plaintiff and these defendants for said machinery was in writing, and was in words and figures following, to wit:

2 "This agreement, made and entered into this 22nd day of June, A. D. 1888, by and between Russell & Co., of Massillon, Ohio, by its agent, H. W. Young, party of the first part, and J. A. Buckstaff, and J. E. Utt, parties of the second part:

Witnesseth, that the said Russell & Co., agree to furnish the following machinery, delivered on cars at Lincoln, Nebraska: Three (3) boilers, 60 inch- x 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine 50 horse power; one Gorden Maxwell duplex pump; one (1) Garfield injector; one (1) heater, and any necessary fittings of sufficient size and dimention to properly run such a plant; also two (2) smoke-stacks 32 inch-diameter, 60 feet long, made of No. 12 iron with fancy tops, guy rods and stays. Hereto attached and made a part of this contract, proposals, marked Exhibits A, B, C & D. For and in consideration of and in payment for the same: the said J. A. Buckstaff and J. E. Utt agree to pay four thousand, nine hundred and fifty dollars ($4,950.00) as follows: One-third cash when machinery is steamed up ready to run, the balance in six (6) and twelve (12) months, with interest at the rate of 7 % per annum from time of erection in Lincoln, providing that with proper & careful management, said en-

gines, boilers and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves before payments are due, that said engines, boilers and pumps are working to their entire satisfaction, and should they not be, then, in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within 60 days, and in the event they do not,
3 the said Buckstaff & Utt may declare this contract, paid in full, or said Russell & Co., shall pay back to said Buckstaff & Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff & Utt such damage as shall be declared fair by competent judges, and after paying such damages, may remove said machinery without costs to said Buckstaff & Utt.

It *is* hereby agreed that said Russell & Co. shall ship said machinery not later than July 15th, 1888. This contract signed in duplicate.

(Signed) RUSSELL & CO.,
E. C. HARRIS, *Manager.*
J. A. BUCKSTAFF.
J. E. UTT."

Plaintiff further alleges that all of said machinery covered by and embraced in said contract was delivered by the plaintiff to the defendants in strict accordance with the terms of said contract; that the machinery so delivered to the defendant by this plaintiff consisted of three (3) boilers, 60 inches by 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine, 50 horse power; one (1) Gordon Maxwell duplex pump; one (1) Garfield injector; one (1) heater, and any necessary fittings of sufficient size and dimension to properly run said machinery; also two (2) smoke-stacks, 32 inches in diameter, 60 feet long, made of No. 12 iron, with fancy tops, guy rods and stays; all of which said machinery is more particularly and definitely described in Exhibits B, C, D, & E, which were made a part of the original contract of sale, a copy of which *are* attached to this petition and made a part thereof and marked Exhibits B, C, D, & E; that said defendants were to pay to these plaintiffs for said machinery so sold and delivered to them the sum of four thousand nine hundred and fifty dollars ($4,950.00); one-third of which amount was to be paid in cash when the machinery was steamed up ready to run, one-third of the balance in six months, and the remaining one-third in twelve months, with
4 interest at the rate of seven per cent. per annum from the time of the erection of said machinery; that all of said machinery has been delivered by the plaintiff to the defendants and has been set up and was put in operation and commenced running on the 9th day of October, 1888, at which time one-third of the four thousand nine hundred and fifty dollars ($4,950) became due; one-third of the balance of the purchase-money for said ma-

chinery became due on the 9th day of April, 1889. Neither of said amounts nor any part thereof have been paid to the plaintiff by the defendants and they have failed, refused, and neglected to pay said amounts or any part thereof, although they have often been requested so to do.

Second Cause of Action.

For a second cause of action against the defendants the plaintiff alleges that afterwards, to wit, on the 29th day of September, 1888, they sold and delivered to the defendants a large amount of other goods, wares, and merchandise, consisting of piping and other fixtures and machinery for the purpose of connecting and putting together the machinery sold and delivered to the defendants, heretofore described in plaintiff's first cause of action; that the prices charged the defendant by the plaintiff for said merchandise was a reasonable price thereof and the price that defendants agreed to pay to the plaintiff. An itemized copy of the machinery and fixtures and piping so sold to the defendants on September 25th, 28th, and 29th, 1888, and October 2nd, 1888, is hereto attached and marked Exhibit "F" and made a part of this petition.

Plaintiff alleges that there is due them from the defendants for said piping, fixtures, and machinery so delivered to the defendants the sum of three hundred ninety-two and $\frac{86}{100}$ dollars ($392.86), together with interest thereon at the rate of seven per cent. per annum from the 9th day of October, 1888.

5 *Third Cause of Action.*

Plaintiff, for a third cause of action, says that on the 9th day of October, 1888, they sold and delivered to the defendants three (3) sets of Dorance grate bars at $150 a set, being a total for the three sets of Dorance grate bars of four hundred and fifty dollars ($450); that no part of said amount has been paid to the plaintiff by the defendants, although the same is long past due and the defendants have often been requested to pay the same, but have failed, refused, and neglected so to do, and there is due the plaintiff from the defendants on this cause of action the sum of four hundred and fifty dollars ($450), with interest at the rate of seven per cent. per annum from the 9th day of October, 1888; that the prices charged the defendants by the plaintiff for said grates was the price which defendants agreed to pay for the same at the time of the sale. An itemized copy of said bill is hereto attached and marked Exhibit "G" and made a part of this petition.

Plaintiff further alleges that after said sale of the engines and machinery described in plaintiff's first cause of action said defendants employed this plaintiff to furnish a superintendent for the purpose of overseeing and superintending the erection of said boilers and engines at said Lincoln, Nebraska, and agreed to pay to this plaintiffs the expenses of said superintendent, including his hotel bill and railroad fare and whatever other legitimate expenses

he might incur during the superintend-y of the erection and construction of said machinery; that this plaintiff employed one F. R. Lind for the purpose of superintending the erection of said boilers and engines; that they paid him as his expenses while so employed in superintending said erection and construction of the boilers and engines the sum of fifty-six dollars and ninety cents ($56.90), which amount was paid by the plaintiff to the said F. R. Lind on the 9th day of October, 1888; that no part of
6 said sum has been paid to this plaintiff by the defendants, although they have often been requested so to do, and there is now due from the defendants to the plaintiff on said account the sum of fifty-six and $\frac{90}{100}$ dollars ($56.90), together with interest thereon at the rate of seven per cent. per annum from October 9th, 1888. An itemized copy showing the expenses incurred by the said F. R. Lind is hereto attached and marked Exhibit "H" and made a part of this petition.

Plaintiff further alleges the fact to be that said boilers and engines so sold and delivered to the defendants by the plaintiff were in perfect order and of first-class quality and would give the amount of horse power as specified in said contract and were and are as economical of fuel under proper and careful management and as durable as a Corliss non-condensing engine.

Plaintiff further alleges that they have done and performed all of their obligations to the defendants arising out of said contract and have fully complied with the strict letter of said contract; that the defendants have at all times failed, refused, and neglected to pay said sum of money or any part thereof which is claimed in plaintiff's first, second, and third causes of action.

Wherefore plaintiff prays judgment against the defendants for the sum of four thousand two hundred and six and $\frac{7}{100}$ dollars ($4,206.07), together with interest thereon at the rate of seven per cent. per annum from the 9th day of October, 1888, and costs of suit.

MARQUETT, DEWEESE & HALL,
Att'ys for Plaintiffs.

STATE OF NEBRASKA, }
Lancaster County, } ss:

F. M. Hall, being duly sworn, on his oath says that he is one of the attorneys of record for the plaintiff in the above-entitled cause of action; that the plaintiffs are non-residents of the State
7 of Nebraska; that he has read the foregoing petition, knows the contents thereof, and that the facts therein stated are true as he believes.

F. M. HALL.

Subscribed in my presence and sworn to before me this 23rd day of April, A. D. 1889.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

Ex. "B."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

We propose to furnish you three eighty-horse-power boilers as described below, to be delivered f. o. b. cars at Lincoln, Neb.; boilers to be of the return tubular type, 14 feet long outside and 60 inches diameter, to contain 46 lap-welded tubes 4 inches diameter, 14 feet long; shell plates to be eleven thirty-seconds of an inch thick; heads to be seven-sixteenth- of an inch thick of flange steel having a tensile strength of 55,000; dome to be 30 inches high and 30 inches diameter; all girth seams to be single riveted, horizontal seams double riveted, heads thoroughly braced.

Boilers to have manhole in rear head above the tube and hand hole in the front head below the tubes, each to be supplied with suitable plates, yokes, and bolts.

Boiler to have two cast-iron lugs on each side to be provided with full front, double fire and ash doors, grate bars and bearers, back wall plate, wall binding bars and anchor rods, cleaning door and frame, safety valve, combination water columns with steam gauge, gauge glass, and gauge cocks, whistle, blow-off, check, and stop valves, 2 stacks 32 inches diameter, 60 feet long, made of No. 12 iron, and two sets of guy rods of sufficient dimensions for plant, breaching in place of stacks, steam-drum connections on main stack.

8 All boilers tested to 150 pounds hydraulic pressure; workmanship and material guaranteed to be first-class; plans for setting boilers to be furnished without expenses to purchaser.

Price for the above-described boiler.....

Ex. "C."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

We propose to furnish you in good shipping order, f. o. b. cars, Lincoln, Neb., one right-hand automatic cut-off engine cylinder, 14 inch- diameter by 20 inches stroke, with main bearings six and one-half by twelve and one-half inches long; one balanced fly-wheel, 72 inches by 16 inches face, to run over at speed of 200 revolutions per minute; 125 H. P. is guaranteed on a maximum pressure of 80 pounds steam inch boilers; main shaft, connecting and piston rods to be made of steel; main bearings, cross-heads, and wrist-pin brasses and shoes of cross-head to be lined with best quality of nickle babbit-.

Throttle-valves fitted to steam chest; full set index lever sight-feed oil cups, grease cups, & cent. oiler, exc. aut. sight-feed lubricator; full set wrenches, foundation bolts, and anchor plates.

We will furnish full plans for erecting foundation; also ten plate for foundation bolts if ten plate is wanted in advance; also founda-

tion bolts of shipment of engine; the freight or express thereon to be paid by purchaser.

We guarantee the above engine to be well made, of first-class material, and in operation to work as economically as any similar engine in the market.

Above-described engine complete, with coping stones for both engine and pillow block.....

"Ex. D."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

We propose to furnish you in good shipping order, f. o. b. cars, Lincoln, one right-hand automatic cut-off engine, cylinder 9 inches diameter by 14 inches stroke, with main bearings 4 by 7 and one-half inches long; one balanced fly-wheel, 54 inches by 13 inches face, to run over at a speed of 260 revolutions per minute. 50 H. P. is guaranteed on maxims of 80 pounds steam inch boiler. Main shaft, connecting and piston-rods, to be made of steel. Main bearings, cross-head, and wrist-pin braces and shoes of cross-head to be lined with best quality of nickle babbit-. Throttle-valve fitted to steam chest; full set index-lever sight-feed oil cups, grease cups, and centrifugal oiler on crank wrist; automatic sight feed; lubricator; full set of wrenches, foundation bolts, and anchor plates.

We will furnish full plans for erecting foundation; also ten plate for foundation bolts if ten plates are wanted in advance (also foundation bolts) of shipment of engine; the freight or express thereon to be paid by the purchaser.

We guarantee the above engine to be well made, of first-class material, and in operation to work as economically as any similar engine on the market.

Above-described engine complete, with coping stones for both engine and pillow block, —.

"Ex. E."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt *et al.*, Lincoln, Neb.:

We propose to furnish you one cylindrical heater, suitable size; one Gordon Maxwell duplex pump, suitable size.

One Garfield injector, suitable size.

Pipe and fittings as follows: Steam and exhaust pipes on a
10 basis of 12 foor center from boiler to engine; all necessary piping, valves for heater, pump, and injector.

Erection.—Purchaser to pay traveling and hotel expenses of skilled erector from Council Bluffs, Iowa, and furnish all laboring help, notifying us when the machinery is on the grounds.

Price of complete plant as per proposal hereto attached, $4,950.00. Terms: One-third cash when erected, one-third in six months, and one-third in one year, at 7 % interest from time of erection according to contract.

(Signed) J. H. BUCKSTAFF.

Crane Bros.' Manufacturing Co. sold to Russell & Co., Co. Bluffs, Iowa.

Order No. 1605.
Sales book —.
Folio —.
Sold by ——.
Correct.

When referring to this invoice please mention order No., sales book, & folio. Payable with exchange. Goods shipped at buyer's risk. Claims for errors should be made on receipt of goods. Customers will confer a favor by not returning any goods erroneously shipped them without first conferring with us.

OMAHA, NEB., *Sept.* 29, 1888.

30 5 ft. 1½″ pipe, .22		6 70	
30 5 ft. 1¼″ pipe, .12½		3 80	
20 1 " 1″ " 9½		1 91	
31 3 " ⅜″ " 4		1 25	
3 ⅜″ plugs, 3		9	
3 2½ x 1½″ bushings, .42		1 26	
2 2½ 2 C. S. tees, 1.10		2 20	
4 2½″ sh't nipples, .56		2 24	
2 2½″ C. 1 tees, 1.10		2 20	
3 2½″ " " ells, .75		2 25	
2 2½″ flange unions, 1.75		3 50	
4 6″ C. 4 ells, 3.90		15 60	
1 2½″ sh't nipple		56	
1 1½″ C. 1 ell		25	
1 1¼″ mall union		46	
1 1″ " "		34	
3 ⅜″ " "		54	
4 1½″ mall tees, .40		1 60	
3 1¼″ " " .27		81	
3 1″ " " .19		57	
4 1½″ " ells, .34		1 36	
3 1¼″ " " .23		69	
6 ⅜″ " " 5		30	
4 1″ " " .16		64	
			51 12
11 Am't for'd	51 12		
80 7 ft. 2½″ pipe cut, .44	35 46		
87 9 ft. 6″ pipe cut, 1.65	144 78		
6 5 " 1½″ " " .22	1 41		
12 ft. ½″ pipe cut, 5	60		
6 2½″ I. B. globe valves, 10.50	63 00		
22 h'rs' time cutting, .70	15 40		
Box & cartage	75		
		312 52	
33⅓		104 17	
			208 35
By error in discount on time			5 42
			213 77

tion bolts of shipment of engine; the freight or express thereon to be paid by purchaser.

We guarantee the above engine to be well made, of first-class material, and in operation to work as economically as any similar engine in the market.

Above-described engine complete, with coping stones for both engine and pillow block.....

9 "Ex. D."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

We propose to furnish you in good shipping order, f. o. b. cars, Lincoln, one right-hand automatic cut-off engine, cylinder 9 inches diameter by 14 inches stroke, with main bearings 4 by 7 and one-half inches long; one balanced fly-wheel, 54 inches by 13 inches face, to run over at a speed of 260 revolutions per minute. 50 H. P. is guaranteed on maxims of 80 pounds steam inch boiler. Main shaft, connecting and piston-rods, to be made of steel. Main bearings, cross-head, and wrist-pin braces and shoes of cross-head to be lined with best quality of nick*le* babbit-. Throttle-valve fitted to steam chest; full set index-lever sight-feed oil cups, grease cups, and centrifugal oiler on crank wrist; automatic sight feed; lubricator; full set of wrenches, foundation bolts, and anchor plates.

We will furnish full plans for erecting foundation; also ten plate for foundation bolts if ten plates are wanted in advance (also foundation bolts) of shipment of engine; the freight or express thereon to be paid by the purchaser.

We guarantee the above engine to be well made, of first-class material, and in operation to work as economically as any similar engine on the market.

Above-described engine complete, with coping stones for both engine and pillow block, —.

"Ex. E."

LINCOLN, NEB., *June* 21, 1888.

To J. A. Buckstaff and J. E. Utt *et al.*, Lincoln, Neb.:

We propose to furnish you one cylindrical heater, suitable size; one Gordon Maxwell duplex pump, suitable size.

One Garfield injector, suitable size.

Pipe and fittings as follows: Steam and exhaust pipes on a
10 basis of 12 foot center from boiler to engine; all necessary piping, valves for heater, pump, and injector.

Erection.—Purchaser to pay traveling and hotel expenses of skilled erector from Council Bluffs, Iowa, and furnish all laboring help, notifying us when the machinery is on the grounds.

Price of complete plant as per proposal hereto attached, $4,950.00. Terms: One-third cash when erected, one-third in six months, and one-third in one year, at 7 % interest from time of erection according to contract.

(Signed) J. H. BUCKSTAFF.

Crane Bros.' Manufacturing Co. sold to Russell & Co., Co. Bluffs, Iowa.

Order No. 1605.
Sales book —.
Folio —.
Sold by ——.
Correct.

When referring to this invoice please mention order No., sales book, & folio. Payable with exchange. Goods shipped at buyer's risk. Claims for errors should be made on receipt of goods. Customers will confer a favor by not returning any goods erroneously shipped them without first conferring with us.

OMAHA, NEB., *Sept.* 29, 1888.

30 5 ft. 1½″ pipe, .22		6 70	
30 5 ft. 1¼″ pipe, .12½		3 80	
20 1 " 1″ " 9½		1 91	
31 3 " ⅜″ " 4		1 25	
3 ⅜″ plugs, 3		9	
3 2½ x 1½″ bushings, .42		1 26	
2 2½ 2 C. S. tees, 1.10		2 20	
4 2½″ sh't nipples, .56		2 24	
2 2½″ C. 1 tees, 1.10		2 20	
3 2½″ " " ells, .75		2 25	
2 2½″ flange unions, 1.75		3 50	
4 6″ C. 1 ells, 3.90		15 60	
1 2½″ sh't nipple		56	
1 1½″ C. 1 ell		25	
1 1¼″ mall union		46	
1 1″ " "		34	
3 ⅜″ " "		54	
4 1½″ mall tees, .40		1 60	
3 1¼″ " " .27		81	
3 1″ " " .19		57	
4 1½″ " ells, .34		1 36	
3 1¼″ " " .23		69	
6 ⅜″ " " 5		30	
4 1″ " " .16		64	
			51 12
11 Am't for'd	51 12		
80 7 ft. 2½″ pipe cut, .44	35 46		
87 9 ft. 6″ pipe cut, 1.65	144 78		
6 5 " 1½″ " " .22	1 41		
12 ft. ½″ pipe cut, 5	60		
6 2½″ I. B. globe valves, 10.50	63 00		
22 h'rs' time cutting, .70	15 40		
Box & cartage	75		
		312 52	
33⅓		104 17	
			208 35
By error in discount on time			5 42
			213 77

Crane Bros.' Manufacturing Co. sold to Russell & Co., Co. Bluffs, Ia.

Order No. —.
Sales book —.
Folios —.
Sold by ——.
Correct.

When referring to this invoice please mention order No., sales book, & folio. Payable with exchange. Goods shipped at buyer's risk. Claims for errors should be made on receipt of goods. Customers will confer a favor by not returning any goods erroneously shipped them without first conferring with us.

OMAHA, NEB., *Sept. 25th*, 1888.

27 8 ft. 2½″ pipe cut, .44	12 18		
55 9 " 3″ " " .58	32 32		
48 9 " 5″ " " 1.20	58 50		
2 5 x 6 nipples, 2.60	5 20		
1 5 x 9″ "	3 20		
1 5 x 11″ "	3 80		
1 5 x 7 "	2 75		
2 3″ C. I ells, 1.10	2 20		
1 3″ " " tee	1 50		
3 2½″ " " 1.10	3 30		
3 2½″ " ells, .75	2 25		
8 5″ " " " 2.85	22 80		
2 5″ " " tees, 4.00	8 00		
1 5 x 3″ bushing	1 85		
2 5″ globe valves, 32.00	64		
27 h'r's' time, .70	18 90		
Cartage	75		
		243 50	
33⅓		81 16	
			162 34
By error in discount on time			6 53
			168 87

Crane Bros.' Manufacturing Co. sold to Russell & Co., Co. Bluffs, Ia.

Order No. 1818.

OMAHA, NEBRASKA, *Oct.* 2, 1888.

18 ft. 2½″ pipe, .44	7 92		
1 2½″ C. I. ells	75		
		8 67	
33⅓		2 89	
			5 78
½ h'r's time, .70			35
Cartage			25
			6 38

12 Crane Bros. Man'f'g Co. sold to Russell & Co., Co. Bluffs, Ia.

Order No. 1908.

OMAHA, NEB., *Oct.* 9, '88.

1 4½ x 6″ nipple	2 25		
19 ½″–5″ pipe-cut, 1.20	1 95		
3½ ft. ½″ pipe-cut, 4	14		
1 h'r's time	70		
To Lincoln Paper Co., cartage	25		
		5 29	
Lincoln, Neb., 33⅓		1 76	
			3 53
By error in discount on time			31
			3 84

Ex. G.

COUNCIL BLUFFS, IA., *Oct. 9th*, 1888.

J. A. Buckstaff and J. E. Utt to Russell and Co., Dr.

To 3 sets of Dorance grate bars, $150.00 ..... $450 00

Ex. H.

COUNCIL BLUFFS, IA., *Oct. 9th*, 1888.

To J. A. Buckstaff and J. E. Utt to Russell and Co., Massillon, Ohio, Dr.

To expenses of F. R. Lind, superintending the erection of boilers and engines at Lincoln paper mill, as agreed upon and provided for in contract.

Aug. 31, '88.	Railroad fare, Omaha to Lincoln		$1 65	
	Supper		50	
Sept. 1, '88.	1 day's hotel bill, Lincoln		2 00	
2,	1 " " " "		2 00	
	Expenses on tools and baggage to mill		1 00	
9,	Board & room, one week		5 00	
	Street-car tickets		1 00	
16,	Board & room, one week		5 00	
23,	" " "		5 00	
25,	2 days' board		1 40	
	Fare to Omaha		1 65	
	" & return to Council Bluffs		45	
	" to Lincoln from Omaha		1 65	
Oct. 2,	Board and room, one week		5 00	
9,	" " "		5 00	
13	Expenses on tools and baggage to depot		1 50	
	Fare to Council Bluffs		1 90	
	Cutting thread on pipes		3 30	
				45 00

F. R. Lind's bill, continued:

Am't for'd		$45 00
To 2 4½ x 6½ inch elbows		2 80
" 2 4½ x 6½ " nipples		4 00
" 9 *pcices* ¼ x 2½ x 22 iron		2 50
" 12 1 x 12 expansion rollers		2 40
" 2 lbs. rivet*ts*		20
		$56 90

Upon the back of said petition appear endorsements in words and figures following, to wit: No. 25, N. In the circuit court. Russell & Co., plaintiffs, *vs.* Buckstaff & Utt, defendants. Petition. Filed Apr. 25, 1889. Elmer D. Frank, clerk. Marquett, Dewecse & Hall, att'ys for plaintiffs.

Thereupon, afterwards, to wit, at the May term of said —, on the 22nd day of May, 1889, the following proceedings were had and done in said cause, as appears of record on folio 474, Journal N of said court, to wit:

Russel & Co. *vs.* J. A. Buckstaff *et al.* } 25, N.

On motion of defendants, by Harwood, Ames and Kelly, their attorneys, leave is granted by the court to answer herein in sixty days, and plaintiff is ruled to reply in ninety days from this date.

Thereupon, afterwards, to wit, on the 12th day of July, 1889, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States.

Russell and Company, Plaintiffs, *vs.* J. A. Buckstaff & J. E. Utt, Defendants. }

14 *Answer of the Defendants.*

And now comes the said defendants and admit that the said plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Ohio and is a resident of Massillon and a citizen of the State of Ohio, and admit that the defendants are residents of the city of Lincoln and citizens of the State of Nebraska; and the defendants deny that the amount in controversy in this suit, exclusive of interest and costs, is more than two thousand dollars, and deny that there is under and by virtue of the contract sued upon any amount in controversy, but allege and aver said contract is forfeited, and that under and by virtue of the terms of said contract and in compliance therewith said Buckstaff & Utt have declared and do declare said contract paid in full, as provided by the terms of said contract.

And these defendants, in further answering, admit that on or about the 22nd day of June, A. D. 1888, the defendants and plaintiff made and entered into the following contract in writing:

"This agreement made and entered into this 22nd, day of June, A. D. 1888, by and between Russell & Co., of Massillon, Ohio, by its agent, H. W. Young, party of the first part, and J. A. Buckstaff and J. E. Utt, parties of the second part.

Witnesseth, that the said Russell & Co., agree to furnish the following machinery, delivered on cars at Lincoln, Nebraska; three boilers 60 inch x 14 feet; one (1) automatic cut-off engine, 125 horse power, one (1) automatic cut-off engine, 50 horse power; one (1) Gordon Maxwell duplex pump; one (1) Carfield injector; one (1) heater, and any necessary fittings of sufficient size and dimension to properly run such a plant; also two (2) smoke-stacks 32 inch diameter, 60 feet long, made of No. 12 iron with fancy tops, guy rods and stays. Hereto attached and made a part of this contract, proposals, marked Exhibits A, B, C & D, for and in consideration of and in payment for the same the said J. A. Buckstaff and J. E. Utt agree to pay four thousand nine hundred and fifty dollars ($4,950.00) as follows: One-third cash when machinery is steamed up ready to run, the balance in six (6) and twelve (12) months, with interest at the rate of 7 % per annum from time of erection in Lincoln, providing that with proper and careful management said engines, boilers and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified and to be as economical of fuel and as durable as a Corliss non-condensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves before payments are due, that said engines, boilers and pumps are working to their entire satisfaction and should they not be, then, in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within 60 days and in the event they do not, the said Buckstaff & Utt may declare this contract paid in full or said Russell & Co., shall pay to said Buckstaff & Utt all money paid to them, and said Russell & Co., shall pay said Buckstaff & Utt such damages as shall be decreed fair by competent judges and after paying such damages may remove said machinery without costs to said Buckstaff & Utt.

It is hereby agreed that said Russell & Co. shall ship said machinery not later then July 15th, 1888. This contract signed in duplicate.

(Signed) RUSSELL & CO.
E. C. HARRIS, *Manager.*
J. A. BUCKSTAFF.
J. E. UTT."

And these defendants deny that all or any of said machinery covered and embraced in said contract was delivered as required by said contract.

16 And these defendants, in further answering, say it was expressly agreed in and by the terms of said contract that, providing that with proper and careful management, said engines, boilers, and pumps are hereby guaranteed to work and that said engines do give the amount of horse power as herein specified and to be as economical of fuel and as durable as a Corliss non-condensing engine; and it was further stipulated and agreed in said contract as follows: It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves before payments are due that said engines, boilers, and pumps are working to their entire satisfaction; and should they not be, then, in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within 60 days; and in the event they do not, then the said Buckstaff & Utt may declare this contract paid in full or said Russell & Co. shall pay back to said Buckstaff & Utt all the money paid to them, and said Russell & Co. shall pay the said Buckstaff & Utt such damages as shall be decreed fair by competent judges, and, after paying such damages, may remove said machinery without costs to said Buckstaff & Utt.

And these defendants allege and aver that, with proper and careful management, said engines, boilers, and pumps would not and did not do the work guaranteed to be done, and do not and cannot be made to give the amount of horse power specified in said contract, and are not as economical of fuel nor as durable as a Corliss non-condensing engine.

And these defendants, in furthering answering, say that said Buckstaff & Utt did use all fair and honorable means to satisfy themselves that said engines, boilers, and pumps were working to their entire satisfaction, and that said engines, boilers, and pumps did not work to the satisfaction of these defendants and could

17 not be made to be so by any means within the power of these defendants, and that said Buckstaff & Utt did notify said Russell & Co. that said engines, boilers, and pumps were not working to their entire satisfaction, and said Russell & Co. failed to comply with the terms of the written contract aforesaid within 60 days and have so failed to do up to the present time, and upon such failure of the said Russell & Co. to comply with the terms of the contract as aforesaid for more than sixty days the said Buckstaff & Utt did declare and hereby declare this contract paid in full and have requested the said Russell & Co., after more than sixty days' notice aforesaid, to pay back to the said Buckstaff & Utt the money paid to them as hereinafter stated and have requested the said Russell & Co. to pay the said Buckstaff & Utt such damages as shall be declared fair by competent judges, and after paying such damages to remove said machinery without cost to said Buckstaff & Utt.

And these defendants therefore say that said plaintiff ought not to have or maintain *his* said action on the first count and upon the contract set forth in plaintiff's petition and in this answer, because the said plaintiffs have fully failed and neglected to comply with

the terms of said contract and have fully failed and neglected to make said machinery work in a satisfactory manner.

And for answer to the plaintiff's second cause of action the said defendants deny each and every allegation therein contained and each and every item thereof.

And in further answer to said plaintiff's second cause of action say that all of said items in said second count mentioned and therein alleged to have been sold and delivered to the defendants were goods, wares, and merchandise consisting of piping and other fixtures and machinery for the purpose of connecting and putting together
18 the machinery sold and delivered to the defendants under the terms of the written contract mentioned in the first count of plaintiff's petition — were called for and included in said written contract mentioned and set forth in the first count of plaintiff's petition, and the same piping, fixtures, and machinery mentioned in said second count of plaintiff's petition *is* not extras, but all of the same *and* included in the said written contract mentioned in the first count of plaintiff's petition and were required by said written contract, and all of said items mentioned in said second count of plaintiff's petition were furnished by said plaintiffs in part execution of said written contract mentioned in the first count of plaintiff's petition and not otherwise, and were not extras and were not furnished as such.

And, for answer to the said plaintiff's third cause of action, the said defendants deny each and every allegation therein contained and each and every item thereof as the same are therein alleged and averred.

And, for further answer to said third cause of action, say that the said three sets of grates bars are the same grate bars required to be furnished by the said plaintiffs in their said contract mentioned in the first count of said plaintiff's petition, and none other or different.

And, in further answer to said third count of plaintiff's petition, said defendants say that they fully and in all things complied with the terms of their said contract and have fully performed the same and made all payments required by its terms to be made.

And, in further answering said plaintiff's petition, the said defendants deny each and every allegation of the fourth count in said plaintiff's petition as the same are therein alleged and averred.

19 And these defendants allege and aver that they have in all things complied with the terms thereof, and the said plaintiffs have in all things failed to fulfill and perform their said contract or any part thereof, to the damage of said defendants in the sum of five thousand dollars, and said defendants demand judgment against said plaintiff for five thousand dollars and costs of suit.

AMES & MASON,
For Defendants.

STATE OF NEBRASKA, } ss.
County of Lancaster, }

John E Utt, being first duly sworn, deposeth and says he is one of the above named defendants; that the facts, allegations, and statements in the foregoing answer are true as he verily believes.

JOHN E. UTT.

Subscribed in my presence and sworn to before me this — day of July, A D 1889

[SEAL] FRANK A. BOEHMER,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 25, N. Russell and Company *vs.* J. A. Buckstaff & J. E. Utt. Answer of the defts. Filed Jul- 12, 1889. Elmer P. Frank, clerk. O. P. Mason & J. H. Ames, for defts.

Thereupon, afterwards, to wit, on the 20th day of September, 1889, reply was filed in said case, which said reply is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

RUSSELL & COMPANY, Plaintiff. }
vs. } Reply.
J. A. BUCKSTAFF & J. E. UTT, Defts. }

Now comes the plaintiff and for reply to defendants' answer denies that the defendants did use proper care in the management and the running of said engines, boilers, and pumps; but on the contrary, alleges that if they had been properly run and managed by a competent engineer that said machinery would have run in accordance with the capacity in said contract in plaintiff's petition, and that the same could have been made to give the horse power specified in said contract and would have been a compliance with said contract, and that if said machinery had had proper and careful management the pumps would have worked as contracted, and that said engines would have given the guaranteed amount of horse power and have been economical fuel and as durable as a first-class [illegible]

Plaintiff denies that the said Buckstaff and Utt used due and reasonable care in setting the said engine, pumps and all other machinery when it was connected, and that if any said machinery failed to work as contracted in said contract it was [illegible] that the said Buckstaff & Utt did not furnish said engine, and [illegible] as they were bound to do under the terms of said contract.

Plaintiff further denies that it has complied with all of the terms of the written contract between [illegible] which said machinery was sold to defendants.

Plaintiff further denies that said defendants have not declared

said contract paid in full, and denies that they have ever requested plaintiffs to pay back to said Buckstaff & Utt the money paid to them as hereinafter stated, and denies that said defendants have ever made any claim or demands upon this plaintiff for any damages of any kind whatever which defendants claim on account of any defective machinery, and denies that the defendants have ever notified or requested this plaintiff to take out or remove said machinery.

Plaintiff, further replying, denies that all of said items in
21 the second cause of action described in plaintiff's petition mentioned were to be sold and delivered to the defendants under the terms of the written contract mentioned in plaintiff's first cause of action, but, on the contrary, alleges that they were extras and it was never agreed or understood that they were to be covered by or included in the contract mentioned in plaintiff's first cause of action; that all of said goods, wares, and merchandise described in plaintiff's second cause of action, consisting of piping, other fixtures and machinery for the purpose of connecting and putting together the machinery described in the contract named in plaintiff's first cause of action, were extra and were purchased by the defendants from the plaintiffs long after the execution of said contract.

Plaintiff denies that the three sets of grate bars were covered by or included in the contract in plaintiff's first cause of action, but, on the contrary, alleges that they were purchased long after the execution of said contract by defendants from the plaintiffs and was a separate and distinct transaction from that of the contract in plaintiff's first cause of action.

Plaintiff denies that the defendants have fully complied with the terms of their said contract and have fully performed the same and made the payments by defendants' terms to be made, and denies that they have made any payments of any kind whatever, but, on the contrary, plaintiff avers the fact to be that the defendants have at all times neglected and refused to pay to this plaintiff the contract price of said machinery, as the same became due, or any part thereof, but alleges the fact to be that the said Buckstaff and Utt have continued to run and operate their paper mill ever since said machinery was steamed up and ready for use and have manufactured and sold a large amount of paper and have received from the operation of their said paper mill, which is run by the ma-
22 chinery described in plaintiff's petition, a large amount of gains and profits, and that said machinery has at all times ever since it was placed in said paper mill, been used by the defendants to their profit and gain, and is still using and running and operating it in the manufacture of paper and has at all times met all the requirements of the said Buckstaff & Utt and furnished the requisite amount of power in connection with said paper mill.

Plaintiff further allege that the defendants have not been damaged in any sum of money whatever by reason of any alleged defects in said machinery or any part thereof, but, on the contrary, have received large and remunerative profits from the business of running and operating said paper mill; denies each and every other

allegation in said answer contained; wherefore plaintiff prays judgment as in his said petition.

MARQUETT, DEWEESE & HALL,
Attorneys for Plaintiff.

STATE OF NEBRASKA, } ss.:
Lancaster County, }

F. M. Hall, being duly sworn, on his oath says that he is one of the attorneys of record for the plaintiff in the above-entitled cause of action; that plaintiffs are non-residents of the State of Nebraska; that affiant has read the foregoing reply, knows the contents thereof, and that the facts therein set forth are true as he verily believes.

F. M. HALL.

Subscribed in my presence and sworn to before me this 19th day of September, A. D. 1889.

[SEAL.] WILLIAM B. KIRBY,
Notary Public.

Upon the back of said reply appear endorsements in words and figures following, to wit: No. 25, N. In the circuit court of the United States, district of Nebraska. Russell & Company, plaintiffs, *vs.* J. A. Buckstaff & J. E. Utt, def'ts. Reply. Filed Sep. 20, 1889. Elmer D. Frank, clerk. Marquett, Deweese & Hall, att'ys for plaintiff.

22½ Thereupon, afterwards, to wit, at the November term of said court, on the 21st day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio 839, Journal N of said court, to wit:

RUSSELL & COMPANY }
vs. } 25, N.
J. A. BUCKSTAFF *et al.* }

On motion of the plaintiffs, by Marquett, Deweese & Hall, attorneys, leave is granted by the court to file supplemental petition herein to-day, and defendants are ruled to answer in — days.

Thereupon, afterwards, to wit, on the 25th day of November, 1889, supplemental petition was filed in said case; which said supplemental petition is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

RUSSELL & CO., Plaintiffs, }
vs.
J. A. BUCKSTAFF and J. E. UTT, Defendants. }

Now come the plaintiffs above named and, by leave of court first has, file the following supplemental petition in the above-entitled cause, and allege that since the filing of the original peti-

tion in this action there has become due on the contract referred to in the said petition the one-third of the purchase price of the machinery mentioned in said contract, which said contract is set out in the original petition as referred to here for full statement of its contents.

That by the terms of said contract the amount to be paid on the machinery enumerated therein was the sum of $4,950.00, the payments to be made as follows:

One-third cash when the machinery is steamed up ready
23 to run, the balance in six and 12 months, with interest at the rate of seven per cent. per annum from the time of erection in Lincoln

The complainants allege that the said machinery was put in place and erected and ready for use on or about the sixth day of October, A. D. 1888, and was then steamed up and set in operation.

That the last one-third of the purchase price of said $4,950.00, being the sum of $1,650.00, became due by the terms of the said contract one year from the time said machinery was thus placed and erected, and the said year expired on the 6th day of October, A. D. 1889, and the said last one-third of the said contract price became due and payable to these plaintiffs on the sixth day of October, A. D. 1889.

That by the terms of the said contract the said payments were to draw interest at the rate of seven per cent. per annum from the time said machinery was put in place, which was on or about the sixth day of October, A. D. 1889, as before stated.

The plaintiffs further say that in the erection of said machinery and placing the same in the paper mill of the said defendants at Lincoln it became necessary to use a certain amount of piping and fittings in addition to the amount that had been ordered and purchased previously by the said defendants, and that the defendants authorized and directed the agent of these plaintiffs who was putting the said machinery in shape to procure said additional piping and fittings for said pipes, and that these plaintiffs, through their agents, did procure the necessary additional piping and fittings from W. J. Cooper and Cole Brothers, of Lincoln, Nebraska, and placed the same in position for the said defendants in their paper mill at Lincoln, Nebraska, which bill amounts to the sum of $26.13, which bill had not been presented to these plaintiffs at the time of the beginning of this action, but which has subsequently thereto
24 been presented to the said defendant by the said W. J. Cooper and Cole Brothers for payment, and that these defendants failed and refused to pay the same; which bill, with items, is hereto attached and made part hereof, marked X.

Whereupon the plaintiffs, having ordered the same through their agent, paid the said bill for the said defendants to the said W. J. Cooper and Cole Brothers on the 30th day of April, 1889, which amount, with interest at seven per cent. from said date of payment, is due to these plaintiffs from the said defendants, and which they have neglected and refused to pay to these plaintiffs.

Wherefore these plaintiffs pray judgment against the said defend-

ants on this supplemental petition, in addition to the amount prayed for in their original petition, for the said sum of $1,650, with interest at the rate of seven per cent. from the sixth day of October, A. D. 1888, and for the said sum of $26.13, with interest at the rate of seven per cent. from the 30th day of April, A. D. 1889, together with costs as originally prayed.

MARQUETT, DEWEESE & HALL,
Attorneys for Pl'ff.

UNITED STATES OF AMERICA,)
State and District of Nebraska, Douglas County,) *ss:*

J. W. Deweese, being first duly sworn, deposes and says that he is the attorney for the above-named plaintiffs, who are a non-resident corporation, and that the facts stated in the foregoing supplemental petition are true as he verily believes.

J. W. DEWEESE.

Subscribed in my presence and sworn to before me this — day of ——, A. D. 1889.

Verification waived.

O. P. MASON,
HARWOOD, AMES & KELLY,
Att'ys for Def't.

25 Bought of W. J. Cooper & Cole Bros., steam, gas, and water supplies, 140 to 146 South 10th St.

Terms, 60 days.
Ten per cent. interest after maturity.

State agents Althouse vaneless windmills.

1888.			
Nov. 17.	2 5-in. thread & 1 5-in. cut, .55, 1.65		1 65
	2 5-in. coupling	3 30	
	1 5-in. nipple	2 00	
	60%	5 30	2 12
	21 hours' labor, .40		8 40
	17 " " .50		8 50
	2 trips' drayage		2 00
	By		22 67 = 22 67
19.	$3\frac{2}{12}$ ft. 3" pipe, .58	1 84	
	50%		92
	1 3-in. cut, .20; 2 3-in. thread, .40		60
	1 5-in. ell	2 85	
	1 5-in. close nipple	2 00	
	60%	4 85	1 94
			3 46 = 3 46
			$26 13

DEAR SIR: Yours 5th at hand, & above we hand you itemized bill, all furnished for the paper mill, & hope you will find correct and remit.

Resp'y yours, W. J. COOPER & COLE BROS.

Upon the back of said supplemental petition appear endorsements in words and figures following, to wit: No. 25, N. In the U. S. circuit court, district of Nebraska. Russell & Co., plaintiffs, *vs.* J. A. Buckstaff and J. E. Utt, defendants. Sup-lemental petition. Filed Nov. 25, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 25th day of November, 1889, amended answer was filed in said case; which said amended answer is in words and figures following, to wit:

Circuit Court of the United States, District of Nebraska.

26 *Amended Answer.*

In Circuit Court of the United States, District of Nebraska.

RUSSELL & COMPANY, Plaintiff,
vs.
J. A. BUCKSTAFF & J. E. UTT, Def'ts. } Amended Answer.

The defendants, for answer to petition and supplemental petition of the plaintiff heretofore filed herein, for a first defense to the first cause of action alleged therein admit the execution of the written contract of date the twenty-second day of June, 1888, in said petition set forth, and, further answering said first alleged cause of action, say that although the said plaintiff furnished to these defendants, in pretended compliance on their part with said contract, three boilers, sixty inch by fourteen feet, one automatic cut-off engine of one hundred and twenty-five horse power, and one automatic cut-off engine of fifty horse power, and one Gordon Maxwell pump, one Garfield injector, one heater, and certain fixtures and fittings therefor, and also two smoke-stacks, 32 inches in diameter and sixty feet long, yet these defendants say that, notwithstanding the fact is that all and singular said engines, boilers, and machinery were erected by and under the personal supervision and direction and in accordance with the instructions of the agents and employés of said plaintiff, and notwithstanding the said machinery has at all times been and now is properly and carefully managed by these defendants, the said engines and boilers do not give and have not given and are incapable of producing the amount of horse power specified in said contract, and are not and have not at any time been as economical of fuel as the Corliss non-condensing engine, but, on the contrary,

27 these defendants aver that said boilers are and have been capable of producing not to exceed sixty-five horse power each, and said engines are and have been capable of producing much less than the amount of horse power in said contract specified, and said boilers, engines, and machinery consume and at all times consumed in the performance of such work as they are

capable of performing not less than fifty per cent. more fuel than does a non-condensing Corliss engine in performing the same amount of work.

These defendants further say that they have at all times used all fair and honorable means to satisfy themselves that said engines, boilers, and machinery are capable of meeting and fulfilling the stipulations and guarantees of said contract, and have repeatedly requested the plaintiff to cause the same so to do, but that, notwithstanding repeated and continuous efforts on the part of both the plaintiff and these defendants since the erection of said machinery to cause the same to meet and fulfill said guarantees, the same has at all times failed so to do to the extent aforesaid, and that therefore, on the eleventh day of January, 1889, and on the eleventh and twenty-fifth days of February, in said year, these defendants notified said plaintiff in writing by letter—by letters properly transmitted through the United States mails—that said boilers, engines, and machinery were defective and insufficient and failed to meet the requirements of said contract in the respects above mentioned and demanded of the said plaintiff the removal of said engines, boilers, and machinery from the property of these said defendants and the payment to these defendants — the amount of money, to wit, $690.68, paid by them to and for the use of the plaintiff under said contract and of the damages suffered by them in consequence of the foregoing premises, yet these defendants aver that the plaintiff has at all times neglected and refused and still does neglect and re-
28 fuse to comply with the said reasonable request of the said defendants and has in no respect met, kept, or complied with any of the stipulations or agreements on its behalf in said contract undertaken, and these defendants deny each and every allegation in said petition and supplemental petition contained not hereinbefore expressly admitted.

2nd. And, for answer to the plaintiff's second cause of action in said petition contained, defendants deny each and every allegation therein contained; and, for further and second answer to said cause of action, say that all the said items in said second cause mentioned and therein alleged to have been sold and delivered to these defendants, were goods, wares, and merchandise, consisting of piping and other fixed machinery, for the purpose of connecting and putting together the boilers, engines, and machinery which were the subject of the written contract mentioned in the first cause of the plaintiff's petition, and were included therein and required by the terms thereof, and that all the same were furnished by said plaintiff in part execution of said written contract.

3rd. And, for answer to the third cause of action set forth in the plaintiff's petition, defendants deny each and every allegation therein contained; and, for further and second answer to said cause of action, defendants say that the three said sets of grate bars therein mentioned were furnished by said defendants as and for the grate bars mentioned in the written contract in said first cause of action set forth and were not otherwise sold or delivered to these defendants; and these defendants further aver that they have fully kept

all and singular — stipulations and agreements in said contract on their behalf *and* undertaken to be kept.

4th. In answer to the fourth cause of action set forth in the plaintiff's petition, these defendants deny each and every allegation therein contained.

29 5th. And, for a fifth and further defense to said petition and supplemental petition, and by way of counter-claim thereto, these defendants aver that on or about the twenty-second day of June, 1888, these defendants, as the plaintiffs then well knew, were and that they now are the owners of all the capital stock of the Lincoln Paper Manufacturing Company, an incorporation duly organized under the laws of the State of Nebraska for the purpose of manufacturing paper in the city of Lincoln, in said State, and that on or about said date the said plaintiff entered into the contract with these defendants, set forth in the first count of the plaintiff's petition herein, for the furnishing of the boilers, engines, and machinery in said contract set forth for the purpose of generating and applying the power with which to drive the machinery to be used by defendants in said mill for the manufacture of wrapping and straw building board, and that the said plaintiff then well knew that if the said boilers, engines, and machinery were not and should not be of the capacity and efficiency specified in said contract—that is to say, the said boilers should not be of eighty horse power each, and if said engines should not be of one hundred and twenty-five and fifty horse power respectively, and as economical of fuel as a Corliss non-condensing engine—that then the defects and inefficiency of this machinery in these respects would of necessity cause these defendants great injury, cost, and damages in and about their said manufacturing business by reducing the quantity and degrading the quality of the paper to be manufactured at said mill and by putting these defendants to great cost and expenses for loss of time and for labor, fuel, and material used, lost, and expended over, above, and beyond such as would be required with the use of boilers, engines, and machinery of the kind, power, effectiveness, and economy specified in said contract.

30 These defendants aver that they entered into said contract with the plaintiff in the expressed confidence, assurance, and belief that the plaintiff would furnish to these defendants for use in their said mill boilers, engines, and machinery of the kind, quality, power, and description in said contract set forth; yet these defendants say that the plaintiffs, in pretended compliance with said contract, furnished and erected in said mill three boilers of a capacity not exceeding sixty-five horse power each and one engine of one hundred and twenty-five and one of fifty horse power, and that said engines and boilers have at all times and still do consume in the performance of the work of which they are capable not less than fifty per cent. more fuel than would be consumed in the performance of the same work by a non-condensing Corliss engine; and the defendants say that said plaintiffs furnished with said boilers and engines defective and insufficient grates, fixtures, and ap-

pliances therefor, so that the same were for a long time less capable and effective than they would otherwise have been.

And these defendants further say that at the expressed solicitation and requests of said plaintiff they allowed said plaintiff, through and by its agents and employés, after the date of the erection of said machinery, to consume a long time in the attempt or pretended attempt to so adjust said boilers, engines, and machinery and supply them with grates and fittings as that the same would meet and comply with the requirements and descriptions of said contract, and all of the attempts or pretended attempts of said plaintiff have wholly and completely failed, and that thereupon, on or about the eleventh day of January, 1889, and the eleventh and twenty-fifth days of February of said year, these defendants duly notified said plaintiff, by letters properly transmitted through the United States mails, that said boilers, engines, and machinery
31 were wholly inadequate, inefficient, and wasteful of fuel as compared with the requirements and descriptions of said contract, and demanded of said plaintiff that plaintiff remove the same from said mill and pay these defendants the amount of money, to wit, $690.68, paid by them to and for the use of plaintiff under said contract and the damages suffered by them by reason of the premises, as by said contract the plaintiff had undertaken to do, with which request the plaintiff has at all times neglected and still does wholly neglect and refuse to comply; and these defendants aver that by reason of the premises, of the wasteful consumption of fuel and lack of power, said boilers, engines, and machinery, and the consequent loss of time and labor and the diminution in quantity and deterioration in quality of the output of said mill aforesaid, resulting from the non-compliance by the plaintiff with said contract in the respects and particulars above set forth and in the purchase and supplying new grate bars and heater fittings and fixtures for said boilers and engines, these defendants have been damaged in the sum of ten thousand dollars. A true account of the items of said money so paid is hereto annexed, marked "A," and made part hereof.

Wherefore the defendants pray that the several pretended causes of action set forth in the plaintiff's petition may be dismissed, and that these defendants may have judgment against the plaintiff for the sum of ten thousand dollars and costs of suit.

O. P. MASON,
HARWOOD, AMES & KELLY,
Defendants' Attorneys.

STATE OF NEBRASKA,)
Douglas County,) *ss:*

John E. Utt, one of the defendants above named, being by me first duly sworn, says that he believes the facts stated in the fore-
32 going answer true.

Subscribed in my presence and sworn to before me this 21st day of November, 1889. ———.

Verificaton waived.

M., D. & H., *For Pl'ff.*

Ex. A.

LINCOLN, NEBRASKA, *Nov.* 23, 1889.

Russel and Co. to Lincoln Paper M'f'g Co.

1888.			
Aug.	25.	Freight on car of machinery	$159 82
"	30.	Do. " "	112 96
Sep.	1.	Do. " "	97 46
"	28.	Do. and drayage on machinery	4 35
"	"	Express ch'ges on p'k'ge from Council Bluffs	30
Oct.	1.	Freight on castings and w't iron	17 69
"	"	" " b'dle pipe and 1 box	5 75
"	4.	Express ch'ges on pipe from Omaha	1 50
"	6.	Cash paid their agent, H. W. Young	20 00
"	15.	Freight from Omaha on pipe	25
Nov.	14.	Cash paid H. W. Young, their agent	65 00
"	19.	Paid Johnson and Babbitt, by order of H. W. Young, their agent	38 75
"	20.	Paid cash to H. W. Young, their ag't	5 00
Dec.	1.	" Pomeroy Coal Co. and Johnson & Babbitt, by order H. W. Young, ag't	17 62
"	8.	Paid cash to W. H. Young, their ag't	15 00
"	15.	" " do. "	5 00
"	"	" M. Ingersoll by H. W. Young's order	2 00
"	21.	" cash to H. W. Young, their ag't	10 00
"	24.	" " do. "	50 00
"	28.	" meals for W. Moore, fireman, by order of H. W. Young	73
"	31.	" Novelty M'f'g Co. by order of H. W. Young	6 50
"	"	" cash to H. W. Young, their agent	2 00
1889.			
Jan'y	7.	" to H. W. Young, ag't, Jan. 4th, $3.00; Jan. 5th, $10.00; Jan'y 15th, $5.00	18 00
Feb.	—.	" H. W. Young, ag't, Feb. 2nd, $15.00; Feb. 4th, $20.00	35 00
			$690 68

Upon the back of said amended answer appear endorsements in words and figures following, to wit: No. 25, N. U.S. circuit c't. dist. of Neb. Russell & Co. *vs.* Buckstaff *et al.* Amended answer. Filed Nov. 25, 1889. Elmer D. Frank, clerk.

33 Thereupon, afterwards, to wit, on the said 25th day of November, 1889, reply was filed in said case; which said reply is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

RUSSELL AND COMPANY
vs.
J. A. BUCKSTAFF & JOHN E. UTT.

Replication to Amended Answer.

Now comes the plaintiff above named and, replying to the amended answer filed by the defendants herein, says that the boilers, engines, and machinery mentioned in the contract referred to, and the piping, fixtures, and machinery ordered by the defendants subsequently to the making of the said contract, were all furnished to the defendants in good faith and as agreed and ordered; but the plaintiff denies that the defendants have had competent and skilled engineers and persons to manage and operate the said engines and machinery, and deny that said machinery was defective or deficient in any respect at the time the same was furnished to the said defendants by the plaintiff, and aver the fact to be that if said machinery has become defective or in any manner incapable of the work and power represented that the same has been caused by the unskillful and incompetent management of the said defendants, their agents and servants; that the said engines, boilers, and machinery were in all respects as represented by the plaintiff and were placed in position as designed and specified and required by the defendants.

Plaintiff denies that the said boilers, engines, and machinery, in the performance of the work contemplated, used fifty per cent. more fuel than does a non-condensing Corliss engine in performing the same amount of work, and denies that the defendants have used fair and honorable means to satisfy themselves of the effi-
34 ciency and power of the said boilers, engines, and machinery, and denies that they have or ever declared the said machinery paid for or notified this plaintiff to that effect.

Plaintiff further says that the defendants have made complaint to this plaintiff of damages and inefficiency in the said machinery; but this plaintiff alleges that said complaints were and are groundless, and that whatever incapacity or inefficiency has been shown and developed in the use of said machinery that the same has been caused by inefficient and incompetent management, and by the direct mismanagement and negligence of the said defendants, their agents and servants.

Plaintiff further denies that the items mentioned in the second cause of action set forth in the plaintiff's petition were goods, wares, and merchandise contemplated to be furnished by the plaintiff in the original contract made with the defendants, but allege the fact to be that they are in addition to the machinery that was ordered in the original contract and are extras furnished at the request of the said defendants.

Plaintiff further says that the three sets of grate bars, being the Dorrance grates, were furnished to defendants by plaintiff on the order of the defendants, made subsequent to the contract made by

the plaintiff with defendants, and were not included in said contract and were in addition to and extra articles furnished outside of the articles agreed to be furnished in the original contract.

Plaintiff denies that the defendants have kept and observed the stipulations and agreements that they have made with the plaintiff in the ordering of said machinery or as specified in said contract.

Further replying to said amended answer, plaintiff denies that it knew that the defendants were the owners of all the capital stock of the Lincoln Paper Manufacturing Company.

35 Denies that said machinery was intended or contemplated to produce or furnish any other or different power from that specified in the contract.

Denies that the said boilers and engines had or have a capacity of less power than that specified in the contract.

Deny that the said grates, fixtures, or any portion of said engines, boilers, and machinery were in any manner defective as furnished by the said plaintiff.

Further replying to said amended answer, plaintiff denies each and every allegation therein contained, except as hereinbefore stated and admitted, and alleges the fact to be that at the time said machinery was furnished and set in operation the same was entirely satisfactory to the said defendants; but that the said defendants have utterly failed and neglected to pay any of the several amounts coming due for said machinery so bought by them, and with a view of avoiding all payment therefor did at subsequent times pretend to find fault with said machinery; that they have used an inferior and unsuitable quality of fuel for the operation of said machinery, and have attempted to operate the same with incompetent and inefficient help and engineers, and have greatly damaged the said machinery by reason of the mismanagement thereof and incompetency of the men attempting to operate the same.

Wherefore the plaintiff prays judgment against the said defendants as set forth in its petition and supplemental petition filed herein and for costs of suit.

MARQUETT, DEWEESE & HALL,
Attorneys for Pl'ff.

Verification waived.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 25, N. In the circuit court, district of Nebraska. Russell & Co. *vs.* J. A. Buckstaff & J. E.
36 Utt. Replication to amended ans. Filed Nov. 25, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the 25th day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio 844, Journal "N" of said court, to wit:

RUSSEL & Co.
vs.
J. A. BUCKSTAFF *et al.* } Trial. No. 25, N.

Now come the parties herein, by their attorneys; also come the following-named persons as jurors, to wit:

1. W. M. Erwin,	5. Mark Hansen,	9. Thos. H. Burchmore,
2. S. H. Case,	6. M. S. Marsh,	10. Robert Mitchell,
3. A. M. Clark,	7. Adolph Prasil,	11. W. C. Riley,
4. J. A. Ware,	8. Jas. McCarney,	12. Geo. Washburn,

who were duly empaneled and sworn according to law, and thereupon, after hearing the evidence in part and the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow morning.

Thereupon, afterwards, at the said November term of said court, on the 29th day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio 857, Journal "N" of said court, to wit:

RUSSEL AND COMPANY
vs.
J. A. BUCKSTAFF *et al.* } 25, N.

It appearing to the court that there has been a death in the family of Robert Mitchell, one of the jurors herein, and both parties consenting thereto in open court, it is ordered that said juror be excused and that this cause be tried by the remaining eleven jurors.

Thereupon, afterwards, to wit, at the said November term
37 of said court, on the 30th day of November, 1889, the following proceedings were had and done in said cause, as appears of record on folio 858, Journal "N" of said court, to wit:

RUSSELL & Co.
vs.
J. A. BUCKSTAFF *et al.* } Cause Submitted to Jury. No 25, N.

On this day again come the parties herein, by their attorneys; also come the jury empaneled and sworn herein. Said jury, after having heard the remaining evidence, the argument of counsel, and charge of the court, retire to their room under the charge of a bailiff, duly sworn, for deliberation.

Thereupon, afterwards, to wit, at the said November term of said court, on the 2nd day of December, 1889, the following proceedings were had and done in said cause, as appears of record on folio 863, Journal "N" of said court, to wit:

RUSSELL AND COMPANY
vs.
J. A. BUCKSTAFF *et al.* } Verdict.

On this day again come the parties hereto, by their attorneys; also come the jurors empaneled and sworn herein into open court and present to the court their verdict, which is in words and figures following, to wit:

In U. S. Circuit Court, Dist. of Neb.

RUSSEL & CO.
vs.
J. A. BUCKSTAFF & J. E. UTT. } No. 25, N.

We, the jury being duly empaneled and sworn to try the issues in the above-entitled cause, do find in favor of the plaintiffs and assess their recovery at four thousand four hundred fifty dollars ($4,450.00).

Dated this 1st December, 1889.

WILLIAM M. ERWIN, *Foreman.*
M. S. MARSH.
W. C. RILEY.
JAMES McCARNEY.
MARK HANSEN.
38 THOS. H. BURCHMORE.
G. C. WASHBURN.
L. H. CASE.
ADOLPH PRASIL.
A. M. CLARK,
J. A. WARE.

Thereupon, afterwards, to wit, on the 3rd day of December, 1889, motion for new trial was filed in said case; which said motion is in words and figures following, to wit:

In the Circuit Court of the United States Sitting within and for the 8th Judicial District in the District of Nebraska.

RUSSELL & COMPANY, Plaintiffs,
vs.
J. A. BUCKSTAFF & J. E. UTT.

And now comes the said defendants and move the court to set aside the verdict of the jury and for a new trial in this cause and for the following reasons:

1. The court erred in excluding evidence tending to prove that the boilers and engines, being of less power than contemplated by the parties at the time the contract of purchase was made, were insufficient to drive the machinery owned by the defendants in their plant for the manufacture of paper, and that by reason thereof said defendants were deprived of profits in their said business as paper manufacturers on account of the inefficiency of the machinery in that particular.

2. The court erred in excluding from the consideration of the jury the loss of time and labor, the waste of fuel, interest on the investment, and the depreciation of the value of the mill property in attempting to operate said boilers and engines from the time the same were steamed up, from October 6, 1888, until the 11 day of March, 1889, and while the said plaintiffs were engaged in the attempt to remedy the defects of construction and cause said machinery to work satisfactorily to said defendants and in
39 accordance with the stipulation of the contract under which the same was purchased.

3. The court erred in instructing the jury by implying that it was impossible to render the engines and boilers as economical of fuel as a non-condensing Corliss engine.

4. The court erred in instructing that the defendants should pay for the property and be credited with the amount they had expended in putting it in proper condition, whereas the undisputed testimony was that the Russell & Co. engine was by its nature impossible to be made as economical as a non-condensing Corliss engine; therefore the court erred in instructing the jury that the defendants were to be allowed as an offset only so much as was necessary to make the engines furnished as efficient as those the contract called for.

5. The court erred in instructing the jury that notwithstanding the plaintiffs had contracted that if the boilers and engines did not furnish power and were not as economical and durable as a non-condensing Corliss engine and were not as satisfactory to the defendants that the plaintiffs should take and remove them at their own expense and without cost to the defendants and pay the defendants their damages, that nevertheless, upon notice being given by the defendants to that effect, it was the duty of the defendants to remove said boilers and engines at their own expense or otherwise they would be regarded as having accepted the boilers and engines.

6. The court erred in instructing the jury that the defendants, notwithstanding the contract required that the plaintiffs, in case the boilers and engines did not furnish the power and were not as economical of fuel and were not as durable as a non-condensing Corliss engine and did not work satisfactorily to the defendants, *to* remove the same at their own cost and pay the defendants
40 damages, they were compelled, if they retained and used said boilers and engines after giving notice that the same did not comply with the contract and requiring the plaintiffs to remove the same, to pay for the same, although the same were not as economical of fuel and were not as durable as a non-condensing Corliss engine and did not work satisfactorily to the defendants. It was stipulated and guaranteed in said contract in writing that the said engines and machinery should be as economical of fuel as a non-condensing Corliss engine and as durable, and also that said machinery should work to the satisfaction of the said defendants. It was further stipulated and agreed that if said machinery failed in this particular, then said Russell & Co. should take out said ma-

chinery at their own cost and pay the said defendants damages which they sustained.

7. For errors of law occurring at the trial and at the time excepted to.

8. The court erred in its construction of the written contract in this: That the plaintiffs in their proposition to furnish boilers proposed to furnish three eighty-horse-power boilers, whereas the court instructed the jury that, the dimensions of the boilers being given, the specification of horse power thereof was controlled by such dimensions.

9. The court erred in the construction of the written contract in holding that the said defendants had waived any rights under said contract by not running the same at their own costs, notwithstanding the contract provides that the same should be removed at plaintiff's costs after paying plaintiff's damages.

10. The court erred in its charge to the jury.

11. The court erred in excluding the evidence offered by said defendants to establish their damages.

41 & 42 12. The court erred in sustaining the objections made to the evidence offered by the plaintiffs and permitting said evidence to be given to the jury.

13. The court erred in its construction of the written contract as to the time when said amounts specified to be paid upon said contract commenced to draw interest.

14. The court should have instructed the jury that none of said sums could interest until said plaintiffs had ceased their endeavors to make said machinery furnished by them to perform as guaranteed in said contract.

15. The court erred in excluding evidence tending to prove that with the knowledge both of the plaintiff and the defendant the boilers and engines in question were purchased with a view to furnishing steam and power for the purpose of operating the machinery, not only of the engines, but of the paper-manufacturing establishment then about to be erected by the defendants.

16. The court in the instructions to the jury practically changed the contract and relieved Russell & Co. from the obligations which they stipulated to perform in the contract—that is, to take out the machinery at their own cost and shifted this duty over onto the defendants in direct violation of the stipulations of the contract, and herein the court erred.

Wherefore the defendants pray that the verdict heretofore rendered herein may be set aside at the costs of the plaintiffs and a new trial ordered herein.

O. P. MASON,
HARWOOD, AMES & KELLY,
Attorneys for Defendants.

Upon the back of said motion appear endorsements in words and figures following, to wit: No. 25, N. Russell & Company *vs.* J. A. Buckstaff & J. E. Utt. Motion for new trial. Filed
43 Dec. 3, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 18th day of December, 1889, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

RUSSELL AND COMPANY, Plaintiff,
vs.
JOHN A. BUCKSTAFF and JOHN E. UTT, Defendants. } Stipulation.

It is agreed by and between the parties to the above-entitled action that a bill of the exceptions taken at the trial thereof at the November, 1889, term of said court, held at Omaha, Nebraska, may be signed, settled, and made of record by the judge of said court who presided at said trial at any time within forty days after the final adjournment of said term of court, and that the same when so signed and settled shall be treated and regarded in all respects as though tendered, signed, settled, and made of record in said cause during the continuance of said term of court.

MARQUETT, DEWEESE & HALL,
Attorneys for Plaintiff, Russell & Co.
HARWOOD, AMES & KELLY,
Attorneys for Defendants, John A. Buckstaff, John E. Utt.

Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 25, N. Russell and Company, plaintiff, *vs.* John A. Buckstaff & John E. Utt. Stipulation. Filed Dec. 18, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, at the January term of said court, on the 6th day of February, 1890, the following proceedings were had and done in said cause, as appears of record on folio 263, Journal "O" of said court, to wit:

RUSSEL & COMPANY
vs.
J. A. BUCKSTAFF and J. E. UTT. } Motion for New Trial Overruled and Judgment. No. 25, Docket N.

This cause came on for hearing on the motion of the defendants to set aside the verdict and for a new trial herein, and the court, on consideration thereof, does overrule the same.

It is therefore ordered and adjudged by the court that the said plaintiffs, Russell & Company, recover from the said defendants, J. A. Buckstaff and J. E. Utt, the sum of $4,450.00 as heretofore, by the verdict of the jury, found due them, with interest from December 2, 1889, together with $——, costs herein expended, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 24th day of February, 1890, bill of exceptions was filed in said case; which said bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

RUSSELL & COMPANY, Plaintiff,
vs.
JOHN A. BUCKSTAFF and JOHN E. UTT, Defendants.

Be it remembered that upon the trial of the above-entitled action at November term, 1889, trial held at Omaha, Nebraska, before the Honorable Elmer S. Dundy, one of the judges of said court, presiding, and a jury, the following, among other, proceedings were had and done, viz:

1. The defendants objected to the introduction of any evidence in support of the first alleged cause of action in the petition of the plaintiff, on the ground that the same does not state facts sufficient to constitute a cause of action in favor of the plaintiff and
45 against the defendants; which objection the court overruled; to which ruling of the court the defendants, by their counsel, then and there duly excepted.

The plaintiff introduced testimony showing that a written contract had been entered into between the plaintiff and defendants in words and figures following, to wit:

"This agreement, made and entered into this 22nd day of June, A. D. 1888, by and between Russell & Co. of Massillon, Ohio, by its agent, H. W. Young, parties of the first part, and J. A. Buckstaff & J. E. Utt, parties of the second part:

Witnesseth, that the said Russell & Co., agree to furnish the following machinery, delivered on cars at Lincoln, Nebraska: Three (3) boilers, 60 inch- x 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine 50 horse power; one Gordon Maxwell duplex pump; one (1) Garfield injector; one (1) heater, and any necessary fittings of sufficient size and dimension to properly run such a plant; also two (2) smoke-stacks 32 inch diameter 60 feet long, made of No. 12 iron, with fancy tops, guy rods and stays. Hereto attached and made a part of this contract, proposals marked 'Exhibit A, B, C & D.' For and in consideration of and in payment for the same, the said J. A. Buckstaff and J. E. Utt agree to pay four thousand nine hundred and fifty dollars ($4,950.00) as follows: One-third cash when machinery is steamed up ready to run; the balance in six (6) and twelve (12) months, with interest at the rate of 7 % per annum from time of erection in Lincoln; providing, that with proper and careful management, said engines, boilers and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves before payments are due, that said engines, boilers and pumps
46 are working to their entire satisfaction, and should they not be, then, in that event the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co., must at once comply

with the terms of this contract within 60 days; and in the event they do not, the said Buckstaff & Utt may declare this contract paid in full, or said Russell & Co., shall pay back to said Buckstaff & Utt all money paid to them, and said Russell & Co., shall pay said Buckstaff & Utt such damages as shall be declared fair by competent judges, and after paying such damages, may remove said machinery without cost to said Buckstaff & Utt.

It is hereby agreed that said Russell & Co. shall ship said machinery not later than July 15th, 1888. This contract signed in duplicate.

(Signed) RUSSELL & CO.,
E. C. HARRIS, *Manager.*
J. A. BUCKSTAFF.
J. E. UTT."

That this agreement at the time made was accompanied with a proposal on the part of the plaintiff to defendants, made in duplicate form, to furnish boilers and two certain engines in accordance with said contract. One of these proposals referred to the power of the boilers as "eight" horse power and the other as "eighty" horse power. Said proposals contained a clause that the purchasers should pay the traveling and hotel expenses of a skilled erector from Council Bluffs, Iowa, and that they should furnish all the labor and material used in the erection of the same. Such erector was furnished by the plaintiff, who superintended the erection of said machinery, and the engines and machinery were placed according to certain plans furnished by the defendants. The evidence tended to prove that there were certain defects in the foundation work and material therein in the erection of said machinery and the manner of its erection, which rendered said machinery less economical of fuel and less effective as respects the amount of water evap-
47 orated in the production of a given amount of horse power per hour than would have been the case had such defects not existed, but whether the defects claimed were due to the fault of the plaintiff or its agents or to the fault of the defendants or their agents or whether the joint fault of both contributed thereto the evidence upon said trial is conflicting.

II.

The evidence further showed that the boilers furnished by the plaintiff and erected on the defendants' property are each 14 feet long and 60 inches in diameter, containing each 46 tubes three and one-half inches in diameter; that the plaintiff handled the same sized boilers with different sized tubes, but that the defendants ordered the boilers to be furnished with tubes of three and one-half inches in diameter, in accordance with the plans furnished by the parties furnishing the paper-mill plant.

The witness for the plaintiff and also for the defendants both agreed that by the recognized standard of measurements for determining the capacity of boilers the power of said boilers could readily be determined by the surface dimensions of the tubes and

ends of the boilers thus furnished; that in figuring upon these dimensions, A. R. Baxter, tendered by the plaintiff, made the capacity of the boilers 68½ horse power each. Some of the witnesses for the defense made the horse power as low as 65 for each boiler in their figuring upon the capacity.

III.

The evidence tended to show that these boilers and engines were used in connection with and in operating a paper-mill plant, in which the machinery for the manufacture of the paper proper, through the means of pipes, rollers, cookers, and various heating and drying apparatus, were furnished by other parties than the plaintiff, and
48 that on or about the 6th or 7th day of February, 1889, the defendants complained that the boilers and engines were using too much water and were not as economical and effective as they ought to be, and the defendants, together with A. R. Baxter, who represented the plaintiff, undertook to ascertain the capacity and economy of said machinery, when in making this test the plaintiff had no control of the kind of coal that was used in the heating, nor any control of the fireman who fed the fire; and at said time all the machinery was operating through the paper-mill plant; and, the 50-horse-power engine being operated at 15 horse power and the 125-horse engine being operated at about 80 horse power, it was ascertained that there were some 37.3 pounds of water per hour per horse power developed upon the engines; that a little over 4 pounds of water was used in developing steam which was employed elsewhere in the defendants' machinery and in overcoming back pressure or counteracting force upon the engines, so that the actual or practical quantity of water used, in relation to the effective force developed, was 33.1 pounds per horse power per hour. These are the figures that were given by the witness A. R. Baxter, but on this point the evidence was slightly conflicting. The plaintiff offered testimony tending to prove that the defendants used a poor quality of coal, it merely being slack and of so fine a quality that it lay in a compact bed, and the fire was improperly fed by the fireman, which injuriously affected the ability of said machinery to develop effective force economically, but as to this latter matter also the evidence in said trial was conflicting.

IV.

The evidence tended to show that the boilers and engines had been erected and were steamed up on or about the 6th day of October, 1888; that the defendants had never before operated a paper mill, and that they furnished engineers and firemen to operate said machinery who had not before operated a paper plant, and
49 *and* that the plant did not operate successfully nor to the satisfaction of the defendants; that they notified the plaintiff of this fact and plaintiff sent agents to see what was the matter with the machinery and correct the mistakes that had been made by the engineers furnished by the defendants, some of whom were [illegible]

charged and others furnished in their places, the evidence tending to prove that some of the engineers who thus attempted to operate said machinery were incompetent and allowed the water to run down in the boilers until the soft cocks in the rear end of the same were blown out and permitted the Babbitt in the boxing for the engines to melt out, and by continuing to operate the machinery it caused the cylinders to become partially cut and made rough; and the evidence offered by the plaintiff as to the manner of operating this machinery tended to show that when it was operated as directed by the plaintiff's engineer it operated all right and satisfactorily. But on all these points in this paragraph there was a conflict in the testimony and the defendants continued to complain of the operation of said machinery from time to time for some months after the said machinery was put in operation, and that defendant Utt testified that the defendants had used all means within their power or knowledge to make the boilers and engines develop the amount of horse power and operate as economically as specified in the contract or to work satisfactorily, but that, in his opinion, the machinery did not work as economically and satisfactorily as provided for in the contract. On this point the evidence was conflicting, and the defendant Buckstaff testified that it was impossible to run the mill all the time with said machinery, and that it consumed more coal than was necessary. But on this point the evidence tended to prove that the grate used in said machinery was the rotary grate, with spaces in the grate made for the use of large-sized coal; that this grate was specially ordered by the defendants, and that the kind of coal used in this grate was not such as was adapted to the grate, nor was the coal of proper quality to use in the operation of said machinery. On this point the evidence of the plaintiff and defendants was conflicting.

V.

Evidence was introduced by the defendants tending to show that, under favorable conditions, the non-condensing Corliss engine did not consume, as testified by some of the witnesses, to exceed 24 to 26 pounds of water per horse power per hour, and that in their opinion it was a mechanical impossibility that the engines in question, being single-valve high-speed engines, should be as economical in this respect, under substantially the same circumstances and conditions, as the non-condensing Corliss engines, and that the economy in fuel in the use of the engine is determined by its economy in its consumption of water per horse power per hour, but the witnesses thus produced by the defendants on this point testified from the theoretical standpoint and from the knowledge of books and civil engineering, but not from any practical test in the practical use and operation of the non-condensing Corliss engine, excepting as to witness Hartley. The plaintiff produced testimony of the same character from a theoretical and scientific engineering standpoint, which was conflicting with that of the defendants, and also produced one David Gilbert, who had been in the practical operation of non-condensing Corliss engines and other engines for seventeen years continuously

and who was at the time operating five different engines—two of them non-condensing Corliss and two of other kinds—who testified that the said non-condensing Corliss engine in practical use and operation consumed on an average forty pounds of water per horse power per hour.

The evidence further tended to show that the test- of engines referred to in works on the operation of engines are such as are
51 made under the most favorable circumstances and made for the purpose of showing the extreme power and economy of the engines, and the witness Reynolds, produced by the defense, showed that he had been a practical engineer for many years, and that tests which produced the best results, both in power and economy, were made where the boilers were close to the engines and the best of coal used, with all steam for the operation of machinery shut off, excepting that necessary to develop the power of the engines, and that no true test could be made that would indicate the value and power and economy of an engine unless the full power of the engine was put on; that where only a portion of the power of an engine was used in making a test it would not show the economy of its operation and no sufficient test could be made without the full power of the engine being used; and the evidence showed that the time the test referred to was made the full power of the engines was not used; that the fifty-horse-power engine was only loaded so as to use 15 horse power, and that the 125-horse-power engine was loaded so as to use only — horse power.

The evidence further tended to show that to make a test under favorable circumstances the least amount of water necessary to use is the most economical, and that at the time the test was made a large excess of water was used in the operation of said machinery, and that this kept the steam in a wetter condition than it otherwise would have been and consequently less effective.

On this point there was a conflict of testimony.

VI.

It was further admitted on the trial that the following letters were written by the defendants and duly transmitted by them through the United States postal department to the plaintiff, the postage being prepaid, as required by law, at the time which the said letters severally bear date:

52 "LINCOLN, NEB., 11*th January*, 1889.

Messrs. Russell & Co., Massillon, Ohio.

GENTLEMEN: Permit us to call your attention to your contract with Buckstaff & Utt under date of the 22nd day of June, 1888.

Ever since said engines and boilers were put in your man Young has been here most of the time endeavoring to make said boilers and engines perform as required by the terms of the contract. He has failed to do so and now says you are to send a man from Massillon, Ohio, to look over the plant and see what can be done. These boilers and engines fail and have at all times failed to furnish

the power required by your contract with us and the engines have utterly failed to comply with the contract, and the quantity of coal and water consumption is greatly in excess of the quantity in your contract, and we now desire a compliance with the contract on your part or the payment and damages and removal of the machinery as provided for by the contract, and we respectfully request you to send a man at your expense and make engines and boilers do the work required of them by the contract and perform as required by the terms of contract or you pay the damages and remove the machinery.

Yours, truly, BUCKSTAFF & UTT."

" LINCOLN, NEB., 11*th of Feb.*, 1889.

Messrs. Russell & Co., Massillon, Ohio.

GENTLEMEN: Permit us to call your attention to our letter of January 11th, 1889, calling attention to your contract with Buckstaff & Utt under date of 22d of June, 1888. Your Mr. Baxter, from Massillon, Ohio, has been here and in company with Mr.
53 Young had looked over the plant and made an examination thereof. The test made by them shows that these boilers and engines still fail to furnish the power required by your contract with us and show a large increase in the consumption of coal and water consumption in excess of the quantity stipulated in the contract. We now request a compliance with the terms of the contract on your part—a payment of the damages we have sustained and a removal of the machinery, as provided by your contract—and we would like an adjustment of this matter at the earliest day convenient. We are being daily damaged in the excessive increase of the fuel consumption and the quantity of water required to be converted into steam to propel this machinery, as well as being greatly hindered and delayed in our manufacturing industry, and are put to great expense in the details of our business, the increase of labor required, and the failure of the machinery furnished by you to perform as required by the terms of your contract with us.

It now seems your Mr. Baxter and Mr. Young have made an effort to remedy the defects and make the machinery perform as required by the contract. In this they have utterly failed, and have ceased further effort in that direction. We now desire you to pay the damages, and, upon adjustment of the damages, remove the defective machinery.

Yours, truly, BUCKSTAFF & UTT."

The evidence also showed that on January 11th the defendants telegraphed the plaintiff at Massillon, Ohio, and plaintiff answered by telegraph, and also wrote the following letter and sent to the defendants on the said date, which was received by them:

"MASSILLON, O., U. S. A., *Jan'y* 11, 1889.

Dictated by V. S. R.

Buckstaff & Utt, Lincoln, Nebr.

54 GENTLEMEN: Your telegram of even date received. We replied by wire, 'Man left here for Lincoln, via Council Bluffs, Wednesday evening.' He should reach you by to-morrow, Saturday, morning. We did not know for what point he was wanted and consequently sent him direct to our Council Bluffs branch house, with instructions to report to them and they would give him further orders.

Trust he has reached you and adjusted your plant so that it is before this giving satisfaction.

Yours, truly, etc., RUSSELL & CO.
R."

It is further admitted that the defendants wrote and sent to the plaintiff the following letters, dated October 6th, 1888, at the date thereof:

"LINCOLN, NEB., *Oct.* 6, 1888.

Russell & Co., Council Bluffs, Ia.

MY DEAR SIRS: The boilers, engines, &c., placed by your Co. in our paper mills at Lincoln by F. R. Lind are satisfactory so far as we are able to judge. The services performed by that gentleman are first class; his work is seemingly first class in all respects.

Hoping there may be no cause for complaint in the future, we are,

Yours, truly, LINCOLN PAPER M'F'G CO.,
P'r J. E. UTT, *Sec'y.*"

It was further shown that the plaintiff's branch office in Council Bluffs, on receipt of the letter of January 11th, answered the defendants as follows:

FEB'Y 19TH, 1889.

Mess. Buckstaff & Utt, Lincoln, Neb.

55 GENTLEMEN: We are in receipt of a copy of your letter to Russell & Co., Massillon, Ohio, under date the 11th inst.; also the original sent them, which has been referred to us for attention. Replying thereto, would say that in reading the contract we notice that it has been invalidated on your part by a failure to comply with its conditions and requirements, namely:

1st. In not making payment as set forth and stipulated therein.

2nd. In not furnishing competent and experienced help, which is adverse to proper and careful management and not as required and stipulated therein, the engines *b*earing witness.

While on our part we have complied with the conditions stipulated therein, namely:

1st. In furnishing the engines, boilers, heaters, pump, injector, and fittings;

2nd. In the taking of indicator cards by Mr. Ogden and our Mr. Baxter under the management furnished by you, which shows that with proper and careful management that the engines and boilers

would equal in power and economy of fuel and water to that stipulated therein—

Having fulfilled our part of the contract, we now ask and require fulfillment of same on your part.

Trusting that a peaceful settlement can be obtained, and that you will give the matter your early attention, we await your alternative.

Yours, respect.,

(Signed) RUSSELL & CO.

56 VII.

The witness H. W. YOUNG was produced by the plaintiff and testified that he was at the time of the making of the contract in question one of the agents of the plaintiffs who made the sale of the boilers and engines in question to defendants, and further testified, in response to interrogatories, as follows:

Q. Was it made known to you in any way the kind and power of machinery that was wanted by them?

A. Yes; they told me what size engines and boiler they wanted.

Q. Had the plaintiffs different and various sizes for sale?

A. Yes, sir.

Q. It did not make any difference to them what power was wanted or sold?

A. No, sir.

Q. What sized engines and boilers did they want?

A. They wanted me to make a bid on a fifty-horse-power engine and a one hundred twenty-five horse-power engine and three eighty-horse-power boilers.

Q. Did you so propose?

A. I did, sir.

VIII.

The defendant UTT having been produced and sworn as a witness on behalf of the defense, the following questions were propounded to him by the defendants' counsel:

Q. Who did you and Mr. Buckstaff first commence negotiations with for the purchase of those boilers?

A. With Mr. Giddings.

Q. As representing whom?

A. Russell & Company.

Q. When was that?

A. I think it was in April, 1888.

57 Q. What conversation did you have with him, if any, about the purpose for which the machine must be used and the necessity for steam capacity in the boilers?

To which last question plaintiffs, by their counsel, objected as being irrelevant, immaterial, and incompetent.

Their objection the court sustained, and to the sustaining thereof the defendants, by their counsel, duly excepted.

Q. You may state in what your damages consisted and the amount in consequence of the defective construction and the failure of this machinery to perform its labor and the labor required of it

by the terms of the contract from the time of its erection up to the first day of March.

To which question plaintiffs, by their counsel, objected as incompetent, irrelevant, and immaterial and invading the province of the jury; which objection the court sustained, and the defendants, by their counsel, duly excepted.

Q. You may state what damage you sustained in consequence of the failure of this machinery to do the work at the paper mill.

To which question the plaintiffs, by their counsel, objected as incompetent, immaterial, and irrelevant; which objection the court sustained, and the defendants, by their counsel, duly excepted.

Q. You may state what loss you suffered in consequence of the defective construction and failure in the machinery.

To which question the plaintiffs, by their counsel, objected as being incompetent, immaterial, and irrelevant; which objection the court sustained, and the defendants, by their counsel, duly excepted.

Q. In what particular did you and the defendants Buckstaff sustain loss by reason of the defects in the construction and the failure of this machinery?

To which question the plaintiffs, by their counsel, objected as incompetent, immaterial and irrelevant; which objection
58 the court sustained, and the defendants, by their counsel, duly excepted.

Q. You may state in what manner your industry was affected by the failure of this machinery.

A. When our mill was erected we made contracts with different parties to put in certain machinery. In cutting straw there is a large amount of steam required. We purchased from Neill patent boilers at an expense of five thousand dollars, to be cooked with steam coming from the boilers. That was the proper way to do it. A lack of steam in the plant that we purchased made it impossible for us to cook this straw in these boilers, so after trying six or eight weeks to do this with this steam and succeeding very poorly we took steam from the escape system that we had made in connection with the big engine, and since that time we have been using that steam, but it does not cook the straw well because the water condenses in these globe bleachers and has to be let out, and with them the liquor passes out that the straw is cooked in and it makes an uneven cooking of the straw; it is not uniform. The straw is frequently tough, so that we take it over to the grinding machine, where it is ground up. Instead of grinding it up in two hours and a half to three hours it takes from four to four and a half to get it in proper shape.

To which question the plaintiffs, by their counsel, objected and moved to strike out the answer as incompetent, immaterial, and irrelevant; which objection and motion the court sustained, and the defendants, by their counsel, duly excepted.

Whereupon the defendants have prepared and now present this their bill of exceptions taken at said trial, and pray the court here

to sign and allow the same and direct the same to be made of record in this cause as of the said November term, 1889, of this court, pursuant to the stipulation of the parties heretofore filed.

59 And on the 6th day of February, 1890, a motion for new trial was overruled and a judgment entered on the verdict for $4,450 and costs. The pl'ffs object to allowance of this bill for reason that the judgment recovered is less than five thousand dollars.

Which is accordingly done, allowed, and ordered as said defendants, by their counsel, have prayed as aforesaid, this 24th day of February, 1890.

(Signed) , ELMER S. DUNDY, *Judge*.

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit: No. 25, N. U. S. circuit court, district of Nebraska. Russell & Company *vs.* John A. Buckstaff *et al.* Bill of exceptions. Filed Feb. 24, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 8th day of March, 1890, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

60 UNITED STATES OF AMERICA, } *ss*:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Russell & Company, plaintiff, and John A. Buckstaff and John Utt, defendants, a manifest error hath happened, to the great damage of the said defendants in the said cause, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 8th day of March, 1890. E. D. FRANK, *Clerk*.

[Seal United States Circuit Court, District of Nebraska.]

Allowed by—
ELMER S. DUNDY, *Judge*.

[Endorsed:] No. 25, N. United States circuit court, district of Nebraska. John A. Buckstaff and John Utt, plaintiffs in error, *vs.* Russell & Company, def't in error. Writ of error. Filed Mar. 8, 1890. Elmer D. Frank, clerk.

61 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To Russell and Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein John A. Buckstaff and John Utt are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this eighth day of March, 1890.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

[Endorsed:] Original. No. 25, N. United States circuit court, district of Nebraska. John A. Buckstaff and John Utt, plaintiffs in error, *vs.* Russell and Company, defendant in error. Citation. Filed Mar. 27, 1890. Elmer D. Frank, clerk. Received copy of this M'ch 10th, 1890. Marquett, Dewcese & Hall, att'ys for def'ts in error.

62 Thereupon, afterwards, to wit, on the said 27th day of March, 1890, a bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, John A. Buckstaff and John E. Utt, as principal-, and —— ——, as sureties, are held and firmly bound unto Russell & Company (incorporated) in the full and just sum of eight thousand and nine hundred ($8,900) —, to be paid to the said Russell & Company, their or its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Russell & Company and John A. Buckstaff and John E. Utt, wherein judgment was rendered against the said John A. Buckstaff and John E. Utt, and the said John A. Buckstaff and John E. Utt hav-

ing obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Russell and Company, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said John A. Buckstaff and John E. Utt shall prosecute their writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN A. BUCKSTAFF.
JOHN E. UTT.
J. H. McMURTRY.

Approved by—
ELMER S. DUNDY, *Judge*.

63 Upon the back of said bond appear endorsements in words and figures following, to wit: No. 25, N. United States circuit court, district of Nebraska. John A. Buckstaff, J. E. Utt, pl'ffs in error, *vs.* Russell & Co. Bond. Filed Mar. 27, 1890. Elmer D. Frank, clerk.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

Pursuant to the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska within the eighth circuit, do hereby certify that the foregoing folios from one to 63 contain true and faithful transcripts from the records and files of said court in the case of Russell and Company *vs.* John A. Buckstaff and J. E. Utt, and that a copy of the writ of error and citation have been lodged and remain in my office.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 28th day of July, A. D. 1890.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk*.

[Endorsed:] John A. Buckstaff *et al.*, pl'fs in error, *vs.* Russel & Company.

Endorsed on cover: Case No. 14,193. Nebraska C. C. U. S. No. 207. John A. Buckstaff and John Utt, plaintiffs in error, *vs.* Russell & Company. Filed September 30, 1890.

Office Supreme Court U. S.
FILED.
DEC 26 1893
JAMES H. McKENNEY,
CLERK.

No.....

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1893.

JOHN A. BUCKSTAFF AED
JOHN E. UTT.
Plaintiffs in Error,
vs.
RUSSELL & COMPANY,
Defendants in Error.

TERM No. 207.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR PLAINTIFFS IN ERROR,

By JOHN H. AMES, Their Attorney.

Calhoun & Woodruff, Printers, Lincoln.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN A. BUCKSTAFF AND JOHN UTT,
Plaintiffs in Error.

vs.

RUSSELL & COMPANY,
Defendants in Error.

TERM NO. 207.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR PLAINTIFFS IN ERROR.

By JOHN H. AMES, *Their Attorney.*

STATEMENT OF FACTS.

This action was brought to recover a part of the purchase price of certain engines, boilers and machinery con-

tracted to be sold by and under the following contract. Record, page 1:

"This agreement, made and entered into on this 22d day of June, A. D. 1888, by and between Russell & Co., of Massilon, Ohio, by its agent, H. W. Young, party of the first part, and J. A. Buckstaff and J. E. Utt, parties of the second part:

"Witnesseth, that the said Russell & Co. agree to furnish the following machinery, delivered on cars at Lincoln, Nebraska: Three (3) boilers, 60 inch-x 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine 50 horse power; one (1) Gordon Maxwell duplex pump, one Garfield injector, one (1) heater, and any necessary fittings of sufficient size and dimension to properly run such a plant; also two (2) smoke-stacks 32-inch diameter, 60 feet long, make of No. 12 iron, with fancy tops, guy rods and stays. Hereto attached and made a part of this contract, proposals, marked Exhibits A, B, C, and D. For and in consideration of and in payment for the same, the said J. A. Buckstaff and J. E. Utt agree to pay four thousand, nine hundred and fifty dollars ($4,950) as follows: One-third cash when machinery is steamed up ready to run, the balance in six (6) and twelve (12) months, with interest at the rate of 7 per cent per annum from time of erection in Lincoln, providing that with proper and careful management, said engines, boilers and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves be-

fore payments are due, that said engines, boilers and pumps are working to their entire satisfaction, and should they not be, then, and in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within sixty days, and in the event they do not, the said Buckstaff & Utt may declare this contract paid in full, or said Russell & Co. shall pay back to said Buckstaff & Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff & Utt such damages as shall be declared fair by competeat judges, and after paying such damages, may remove said machinery without costs to said Buckstaff & Utt."

It is not disputed that the boilers, engines and pumps were contracted for by the plaintiffs in error, for the purpose of generating and applying power for the operation of a paper manufacturing plant at Lincoln, Nebraska, and that it was known to all the parties at the time of the transaction that it was essential to the successful prosecution of this business, that this machinery should possess the power and capacity, and be capable of being operated with the economy specified in the contract of sale, and that their failure in any of these respects, would be productive of serious loss and damage to the plaintiff in error, which the defendant in error expressly stipulated in the contract that it would pay if the said plaintiffs in error should after the "use of fair and honorable means to satisfy themselves before payments should become due, that said engines, boilers and pumps were working to their entire satisfaction," not be so satisfied. It was upon this stipulation, which is independent of every other covenant in the agreement of sale, upon which the defense relied at the trial, and which the trial court practically struck from the contract, refusing to give it any force

or significance whatever. The machinery was erected in the mill of plaintiffs in error, between the sixth and ninth days of October, 1888. It is not denied that long prior to the coming due of the first installment of the purchase price by the terms of said contract, the plaintiffs in error had become satisfied that said machinery was "not working to their entire satisfaction," and in fact was not in their opinion, capable of being made to perform the service required of it, and which it was guaranteed to perform by the agreement of sale. Nor is it denied that the defendant in error was promptly notified of this dissatisfaction, and requested to adjust and pay the item of damages, and to remove the machinery, long before the first payment under the contract, became due. This is shown by the following correspondence, printed on pages 35, 36 and 37 of the record:

"LINCOLN, NEB., 11th January, 1889.

"Messrs. Russell & Co., Massilon, Ohio:

GENTLEMEN: Permit us to call your attention to your contract with Backstaff & Utt, under date of 22d June, 1888:

"Ever since said engines and boilers were put in your man Young has been here most of the time endeavoring to make said boilers and engines perform as required by the terms of the contract. He has failed to do so, and now says you are to send a man from Massilon, Ohio, to look over the plant and see what can be done. These boilers and engines fail, and have at all times failed to furnish the power required by your contract with us, and the engines have utterly failed to comply with the contract, and the quantity of coal and water consumption is greatly in excess of the

quantity in your contract, and we now desire a compliance with the contract on your part, or the payment of damages and removal of the machinery as provided for by the contract, and we respectfully request you to send a man at your expense and make engines and boilers do the work required of them by the contract and perform as required by the terms of contract, or you pay the damages and remove the machinery.

Yours truly, BUCKSTAFF & UTT.

"LINCOLN, NEB., 11th of Feb., 1889.

"Messrs. Russell & Co., Massilon, Ohio:

"GENTLEMEN—Permit us to call your attention to our letter of January 11th, 1889, calling attention to your contract with Buckstaff & Utt under date of 22d June, 1888. Your Mr. Baxter, from Massilon, Ohio, has been here and in company with Mr. Young has looked over the plant and made an examination thereof. The tests made by them show that these boilers and engines still fail to furnish the power required by your contract with us and show a large increase in the consumption of coal and water consumption in excess of the quantity stipulated in the contract. We now request a compliance with the terms of the contract on your part—a payment of the damages we have sustained and a removal of the machinery, as provided by your contract—and we would like an adjustment of this matter at the earliest day convenient. We are being daily damaged in the excessive increase of the fuel consumption and the quantity of water required to be converted into steam to propel this machinery, as well as being greatly hindered and delayed in our manufacturing industry, and are put to great expense in the details of our business, the increase of labor required, and the failure of the machinery furnished

by you to perform as required by the terms of your contract with us.

"It now seems your Mr. Baxter and Mr. Young have made an effort to remedy the defects and make the machinery perform as required by the contract. In this they have utterly failed, and have ceased further effort in that direction. We now desire you to pay the damages, and, upon adjustment of the damages, remove the defective machinery.

Yours truly, BUCKSTAFF & UTT."

"MASSILON, O., U. S. A., Jan'y 11, 1889.

"Dictated by V. S. R.

"Buckstaff & Utt, Lincoln, Nebr.:

GENTLEMEN—Your telegram of even date received. We replied by wire, 'Man left here for Lincoln via Council Bluffs, Wednesday evening.' He should reach you by to-morrow, Saturday, morning. We did not know for what point he was wanted and consequently sent him direct to our Council Bluffs branch house, with instruction to report to them and they would give him further orders.

"Trust he has reached you and adjusted your plant so that it is before this giving satisfaction.

"Yours truly, etc., RUSSELL & Co.

"R."

An acconnt of the attempt of Baxter, the agent of the defendant in error, to make the boilers, engines and machinery work satisfactorily to the plaintiffs in error, is given in paragraph III, on page 33 of the Record, and paragraph IV, on page 34, contains the following statement: "The defendants continued to complain of the operation of said machinery from time to time for some months after the said

machinery was put in operation, and defendant Utt testified that the defendants had used all means within their power or knowledge to make the boilers and engines develop the amount of horse power as specified in the contract, or to work satisfactorily; but that in his opinion, the machinery did not work economically and satisfactorily, as provided for in the contract. * * * And the defendant Buckstaff testified that it was impossible to run the mill all the time with said machinery, and that it consumed more coal than was necessary." In paragraph XI, pages 32 and 33, it is established by the testimony of witness for both plaintiff and defendants, that the capacity of the boilers did not exceed 68½ horse power each, or in the aggregate at least 34½ horse power less than was guaranteed by the contract of sale; while, according to the evidence of the witnesses for the plaintiffs in error, it was 45 horse power less than stipulated for. There was also evidence to the effect, as appears by paragraph V, on page 34 of the Record, that it is a mechanical impossibility that a single valve, high speed engine, like those in controversy, should be as economical in operation as a non-condensing Corliss engine, as it was by the contract stipulated that these engines should be.

The plaintiffs in error in their amended answer, besides pleading matter in defense to the cause of action alleged in the petition of the defendant in error, pleaded a counter claim in the following language. (Record, page 21):

"Fifth. And for a fifth and further defense to said petition and supplemental petition, and by way of counterclaim thereto, these defendants aver that on or about the twenty-second day of June, 1888, these defendants, as the plaintiffs then well knew, were, and that they now are the

by you to perform as required by the terms of your contract with us.

"It now seems your Mr. Baxter and Mr. Young have made an effort to remedy the defects and make the machinery perform as required by the contract. In this they have utterly failed, and have ceased further effort in that direction. We now desire you to pay the damages, and, upon adjustment of the damages, remove the defective machinery.

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"Fifth. And for a fifth and further defense to said petition and supplemental petition, and by way of counterclaim thereto, these defendants aver that on or about the twenty-second day of June, 1888, these defendants, as the plaintiffs then well knew, were, and that they now are the

owners of all the capital stock of the Lincoln Paper Manufacturing Company, an incorporation duly organized under the laws of the state of Nebraska, for the purpose of manufacturing paper in the city of Lincoln, in said state, and that on or about said date the said plaintiff entered into the contract with these defendants, set forth in the first count of the plaintiff's petition herein, for the furnishing of the boilers, engines and machinery in said contract set forth for the purpose of generating and applying the power with which to drive the machinery to be used by defendants in said mill for the manufacture of wrapping and straw building board, and that the said plaintiff then well knew that if the said boilers, engines and machinery were not and should not be of the capacity and efficiency specified in said contract—that is to say, the said boilers should not be of eighty horse power each, and if said engines should not be of one hundred and twenty-five and fifty horse power respectively, and as economical of fuel as a Corliss non-condensing engine—that then the defects and inefficiency of this machinery in these respects would of necessity cause these defendants great injury, cost and damages in and about their said manufacturing business by reducing the quantity and degrading the quality of the paper to be manufactured at said mill, and by putting these defendants to great cost and expense for loss of time and for labor, fuel and material used, lost, and expended over, above and beyond such as would be required with the use of boilers, engines and machinery of the kind, power, effectiveness, and economy specified in said contract.

These defendants aver that they entered into said contract with the plaintiff in the expressed confidence, assurance and belief that the plaintiff would furnish to these de-

fendants for use in their said mill, boilers, engines and machinery of the kind, quality, power and description in said contract set forth; yet these defendants say that the plaintiffs, in pretended compliance with said contract, furnished and erected in said mill three boilers of a capacity not exceeding sixty-five horse power each, and one engine of one hundred and twenty-five, and one of fifty horse power, and that said engines and boilers have at all times and still do consume in the performance of the work of which they are capable, not less than fifty per cent more fuel than would be consumed in the performance of the same work by a non-condensing Corliss engine; and the defendants say that said plaintiffs furnished with said boilers and engines defective and insufficient grates, fixtures and appliances therefor, so that the same were for a long time less capable and effective than they would otherwise have been.

And these defendants further say that at the express solicitation and requests of said plaintiff, they allowed said plaintiff, through and by its agents and employes, after the date of the erection of said machinery, to consume a long time in the attempt, or pretended attempt, to so adjust said boilers, engines and machinery, and supply them with grates and fittings as that the same would meet and comply with the requirements and descriptions of said contract, and all of the attempts, or pretended attempts, of said plaintiff have wholly and completely failed, and that thereupon, on or about the eleventh day of January, 1889, and the eleventh and twenty-fifth days of February of said year, these defendants duly notified said plaintiff, by letters properly transmitted through the United States mails, that said boilers, engines and machinery were wholly inadequate, inefficient and wasteful of fuel as compared with the

requirements and descriptions of said contract, and demanded of said plaintiff that plaintiff remove the same from said mill and pay these desendants the amount of money, to-wit: $690.68, paid by them to and for the use of plaintiff under said contract and the damages suffered by them by reason of the premises, as by said contract the plaintiff had undertaken to do, with which request the plaintiff has at all times neglected and still does wholly neglect and refuse to comply: and these defendants aver that by reason of the premises, of the wasteful consumption of fuel and lack of power, said boilers, engines, and machinery, and the consequent loss of time and labor, and the diminution in quantity and deterioration in quality of the output of said mill aforesaid, resulting from the non-compliance by the plaintiff with said contract in the respects and particulars above set forth, a d in the purchase and supplying new grate bars and heater fittings and fixtures for said boilers and engines, these defendants have been damaged in the sum of ten thousand dollars. A true account of the items of said money so paid is hereto annexed, marked "A," and made a part hereof.

Wherefore the defendants pray that the several pretended causes of action set forth in the plaintiff's petition may be dismissed, and that these defendants may have judgment against the plaintiff for the sum of ten thousand dollars and costs of suit."

The court, in excluding and striking out the testimony of the plaintiff in error, Utt, as shown by the assignments of error, and upon pages 38 and 39 of the record, deprived the plaintiffs in error of the right to prove the elements and amount of their loss and damages growing out of the facts

set forth in their counter-claim; and for this reason we think the judgment should be reversed and a new trial ordered.

No attempt was made upon the trial to show that the plaintiffs in error omitted any "fair or honorable means to satisfy themselves that said engines, boilers and pumps were working to their entire satisfaction," and it would be a strange presumption that they would have insisted upon the stoppage of their industry, and the loss and inconvenience incident to a removal of the machinery, if by any fair or honorable means such an event could in their opinion have been avoided without greater loss to themselves.

Counsel for the defendant in error and the circuit court seem to have thought that the only matter in controversy was the guaranty "That with proper and careful management said engines, boilers and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel, and as durable as a non-condensing Corliss engine." If this supposition is correct, why was this guaranty followed by the additional stipulation that unless the machinery should upon trial "work to the entire satisfaction" of the plaintiffs in error, the defendant in error should remove it at its own expense, refund the cash payment and pay all losses and damages suffered by the plaintiffs in error by reason of the experiment.

It seems to us to be plain upon the face of the contract, that what the plaintiffs in error sought to accomplish, and what the plaintiff in error conceded by this agreement, was an avoidance of any inquiry such as was indulged in at the trial, as to whether the machinery could upon a scientific

test be shown to have the theoretical capacity and economy specified in the guaranty; or whether the plaintiffs in error possessed or employed in its operation the highest and best, or even a requisite degree of skill and experience, or whether the fuel used was such as would develop the greatest possible efficiency, or whether it is theoretically possible for an engine of this construction to equal in economy, in practical operation, a non-condensing Corliss engine of like indicated power. It was not shown, nor attempted to be shown at the trial that the fuel used by the plaintiffs in error was different in quality from that commonly used for the generation of steam for like purposes under similar circumstances; or that the engineers employed by the plaintiffs in error were known to them to be incompetent, neglectful or unskillful, or were so to any greater degree than is frequently the case with employes in like institutions; and there was evidence sufficient to warrant the jury in finding that the gnaranty was broken in all the respects mentioned; but even if they did so find, the court, by the rulings complained of, prevented the plaintiffs in error from proving in what respects, and to what extent they were damaged by reason of the breach of warranty, so as to recoup the amount thereof against the purchase price, and the jury were compelled to return a verdict for the amount of the latter and interest, without deduction; so that even if the inquiry had been with respect to the warranty only, plaintiffs in error would be entitled to a reversal and a new trial.

But it seems to us very clear that under the pleadings, contract and evidence as disclosed by the record, no inquiry concerning the guaranty was proper, and no recovery could have been properly had by the defendant in error, and that beyond any question or controversy, the plaintiffs in error

were entitled to recover from the defendant in error $690.68, a part of the contract price paid upon delivery, with interest from the date of payment, and also the amount of damages suffered by them in their business in experimenting with the machinery, and such as could be seen to be reasonably incident to the removal thereof from the manufactory, and to the consequent stoppage of their industry. If written contracts are to have any fair or reasonable construction or enforcement, there can be no doubt, looking upon the face of this contract alone, that the intention was that this machinery was to be received by the plaintiffs in error upon approval only; that a completed sale or delivery was not made or contemplated by the parties, and that whether there ever should be such a sale, was left to the choice of the plaintiffs in error, who were to determine on or before the 9th of April, 1889, whether or not the same was "working to their entire satisfaction," and whether, therefore, they desired to complete the purchase, and to notify the defendant in error accordingly. There is no question, either, that long before that time they did decide that the machinery was not such as they desired, and was not satisfactory to them, and did repeatedly notify the defendant in error that they had determined not to complete the purchase, and did request the removal of the machinery, the refunding of the money paid, and the satisfaction of damages as stipulated for in the contract. Upon failure of compliance with this demand, a cause of action immediately accrued to the plaintiffs in error for the recovery of their advance upon the purchase price and their damages; and it is this claim which is is set up in their counter-claim in this action; and it is the evidence in suppor tof it, which was excluded by the circuit court in the rulings complained

of in the assignments of error. The amount of these damages is alleged in the answer to be ten thousand dollars, and the evidence, had it been admitted, would have established them at that sum. They were enhanced very largely by the delays and "tests" which the defendant in error insisted upon making, which, however, were not satisfactory to the plaintiffs in error; but counsel now, very strangely, we think, contend that the latter, by permitting them to be made, waived their option reserved in the agreement as to wether they would complete the purchase. Possibly if the plaintiffs in error had forbidden the agent of the defendant in error, Young, to remain as he did do, in practical charge and operation of the machinery until after the final test and operation was made by him and its other agent, Baxter (record, pages 34, 35 and 66), such refusal might have been complained of as the omission of "fair and honorable means to satisfy themselves." But having permitted it, they must be regarded, has it seems to us, as having abundantly fulfilled this condition of the contract; nor can it be fairly or honorably contended that this permission had any other intent, purpose or effect.

ASSIGNMENTS OF ERROR.

The plaintiffs in error assign as errors apparent upon the face of the record in this case:

1. That the court erred in overruling the objection of the plaintiffs in error to the introduction of any evidence in support of the first alleged cause of action in the petition of the defendant in error, on the ground that the same does not state facts sufficient to constitute a cause of action in favor of said defendant in error, and against the plaintiffs

in error. To which ruling the plaintiffs, by their counsel, at the time duly excepted. Record, page 31.

2. That the court erred when the witness Utt had been produced and sworn as a witness, in sustaining an objection to the following question put to said Utt: "What conversation did you have with him (with Giddings, the agent of the plaintiff), if any, about the purpose for which the machine must be used, and the necessity for steam capacity in the boilers?" And in refusing to permit the witness to testify in answer to said question. Record, page 38.

3. In sustaining an objection to the following question put to said witness Utt, by counsel for the plaintiff in error, viz: "You may state in what your damages consisted, and the amount in consequence of the defective construction, and failure of this machinery to perform its labor, and the labor required of it by the terms of the contract, from the time of its erection up to the first day of March?" And in refusing to permit said witness to testify in answer to said question: to which ruling the plaintiffs in error, by their counsel, then duly excepted. Record, pages 38 and 39.

4. In sustaining an objection to the following question put to said witness Utt: "You may state what damage you sustained in consequence of the failure of this machinery to do the work at the paper mill?" And in refusing to permit said witness to testify in answer to said question; to which ruling the plaintiffs in error, by their counsel, then duly excepted. Record, page 39.

5. That the court erred in sustaining an objection to the following question put to said witness Utt: "You may state what loss you suffered in consequence of the defective

construction and failure in the machinery?" And in refusing to allow said witness to testify in answer to said question; to which ruling the plaintiffs in error, by their counsel, then duly excepted. Record, page 39.

6. That the court erred in sustaining an objection to the following question put to said witness Utt, viz: "In what particular did you and the defendant Buckstaff sustain loss by reason of the defects in the construction and the failure of this machinery?" And in refusing to permit said witness to testify in answer to said question. Record, page 39.

7. That the court erred in sustaining an objection to the following question put to said witness Utt, viz: "You may state in what manner your industry was affected by the failure of this machinery?" And in striking out the following partial answer of said witness, to the question, viz: "When our mill was erected we made contracts with different parties to put in certain machinery. In cutting straw there is a large amount of steam required. We purchased from Neill, patent boilers, at an expense of five thousand dollars, to be cooked with steam coming from the boilers: that was the proper way to do it—and lack of steam in the plant we purchased made it impossible for us to cook this straw in these boilers: so, after trying six or eight weeks to do this with this steam, and succeeding very poorly, we took steam from the escape system which we had made in connection with the big engine; and since that time we have been using that steam; but it doesn't cook the straw well, because the water condenses in these globe bleachers and has to be let out, and with them the liquor passes out that the straw is cooked in, and

it makes an uneven cooking of the straw; it is not uniform. The straw is frequently tough, so that we take it over to the grinding machine, where it is ground up. Instead of grinding it up in two hours and a half to three hours, it takes from four to four and a half to get it in proper shape." And in refusing to permit said witness to testify further in answer to said question; to which ruling the plaintiffs in error, by their counsel, then duly excepted. Record, page 39.

BRIEF.

I.

The plaintiffs in error rely for the reversal of this case mainly upon the authority of the Railroad Company vs. Smith, 21st Wallace 255. It is true that the first four assignments of error in that case were held to be not well laid, because no answers were given to the questions objected to, and because, therefore, this court were unable to ascertain whether the witness, if he had been permitted to testify, was possessed of any knowledge upon the subject of the inquiries. In the case at bar, however, the witness Utt, whose testimony was excluded, was on of the defendants in the court below, and had sworn to the answer which particularized the elements of the defendants' damages, and he again particularized some of them in a partial answer to one of the interrogatories, which answer was by the court stricken out and withdrawn from the consideration of the jury. (Record, page 39.) But it may not be out of the way to say that the writer of this brief participated in the trial as one of the attorneys for the plaintiffs in error, and that when the rulings complained of had been

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made, he did propose to make a formal offer of proof, but that he was then advised by the court that such offer was not permissible in that tribunal, and out of respect for the dignity of the court, and the age, learning, ability and experience of the presiding judge, he desisted from the attempt, and from insisting that the proposal should appear in the record. May we not also repeat the suggestion of Judge Dundy made at the trial: "That the rule itself is not one which by any court ought to be too literally or too rigidly adhered to, and one even the wisdom of which is fairly open to debate. When counsel, being advised by the rulings of the judge, upon objections to questions put to a witness, that said matters will not be permitted to be given in evidence, makes a formal offer to prove such matters he does no more than to repeat what he has already asserted in propounding the interrogatories ruled upon, and the court has no other assurance than his professional honor that he is in fact in position to prove the matters contained in the proposal; while the very fact and manner of the offer itself may be extremely prejudicial to his adversary in the eyes of the jury. If, however, he is confined to the asking of a series of questions, not only his personal honor guarantees his good faith, but he incurs the risk that the court will permit some of them to be answered, and thus, if he is shamming, expose him." Take the case at bar as an illustration: Counsel had asked the witness Utt four questions, all tending in the same direction, and all had upon objection been ruled out. He then asked a fifth question, which the witness in part answered, the answer being afterwards stricken out. Suppose the witness had said that he did not know how, or to what extent, plaintiffs in error had suffered damages, or that in his opinion they had suf-

fered none, would not the exposure and discomfiture of counsel have been complete? But if the ignorance or disposition of the witness being such as just supposed, the fifth question had not been asked, but in lieu thereof a formal offer had been made, the record would have been in technical compliance with the rule, and the court subjected to the liability of being misled and imposed upon.

Either the contract in question is unusual in its terms, or else such contracts have been rarely the subject of litigation, or at all events, we have found it extremely difficult to find judicial authorities exactly in point. The case of Cole vs. The Common Council of Homer, 53rd Mich. 438, is very nearly so. The first paragraph of the syllabus is as follow:

"A town contracted for a wind-pump, and was to have six months in which to test it, and if at the end of that time the pump should be accepted, its proper working for a specified period was guaranteed." The contract further provided that "if the aforesaid wind-engine shall be erected in the manner and perform the work as set forth in this article, the town should pay a stated sum at a specified time. Held, that the last clause was not independent, and the first did not relate merely to the guaranty, but the town had six months in which to determine whether to accept the pump or not, whatever its merits."

It would appear from the report that the engine and pump in question were delivered to the city in 1873, and remained thereafter continuously in its possession, the suit being begun, the court say, just before the statute of limitations would have run. And in the opinion the court say:

"Within the six months specified difficulties arose concerning the responsibility for which the parties are in conflict, and defendants refused to accept the property. This suit was brought shortly before the statute of limitations would have run, to collect the agreed price. The court below allowed a recovery, provided the jury shonld be satisfied that plaintiffs had furnished such work as they agreed to do. There are special findings on various parts of the case. The primary dispute is whether the defendants had a right to decline acceptance if they were not satisfied with the work.

Plaintiffs claim that the last clause of the contract is complete and independent of any other conditions not expressed in it. And they claim that the clause providing for acceptance has no force beyond entitling defendants to the guaranty of good repair in case the work was accepted. And it is suggested that if not accepted the plaintiffs could recover the price without any such guaranty for the future.

This is certainly a possible construction, but whether it is the proper one is a different matter. If it is correct, it is at least very singular. It is difficult to conceive why, if the whole price is payable at all events, the important safeguard for securing durability in the work should be forfeited by an omission to accept, when acceptance would be be a mere ceremony of no importance whatever, and non-acceptance would in no way affect defendant's liability to make prompt and full payment.

It is insisted, however, that defendants only wanted certain machinery for a particular purpose, and have no right to object if it is up to the agreed standard and there-

fore there is no sense in making acceptance or non-acceptance a criterion of liability. We think this idea cannot defeat the agreement of the parties if it does in fact make the question of acceptance one of the matters stipulated on.

When a village corporation desires to supply itself with hydraulic facilities, it is a matter of common experience that it cannot be readily computed in advance just what will meet its supposed necessities. It is only by experiment that it can be known whether any proposed system will serve its purposes. Machinery may do all that it is warranted to do, and yet by its workings show that something else is required to supply the corporate needs. Most of the devices introduced here and there are urged not merely as calculated to do prescribed work, but also on the ground that this work is just what the town requires. Few small corporations can afford expensive engineers, and even where such men are employed they are often found to have caused much expense for unprofitable outlays. It is certainly common and wise to be wary about adopting untried schemes. It is so usual to reserve a right to a preliminary trial, not to test particular capabilities but to ascertain general fitness for general purposes, that where such provisions are inserted in contracts courts must see that they are respected. We think that in the present contract the clause providing for acceptance governs the whole of the contract, and not merely the right to a continuing guaranty, and that during the six months specified it remained optional with the defendants to keep or not keep the property, whether good or bad."

The doctrine of this case was re-affirmed in a very similar case of Mansfield Machine Works vs. The Village

and therefore instructed the jury to find a verdict for the defendant, which they did." * * *

"There is another thing. The contract is express that no payment is to be made until after acceptance by defendant. The *written* portion of the contract, if inconsistent with any part of the *printed* form, must govern and control. It seems to me that a fair construction of the contract is that the village was not to pay for the engine unless they saw fit to accept it; that they were to be satisfied with the machine before they were obliged to accept or pay for it."

"And in Saleski vs. Clark, 44th Conn., 218, this syllabus is as follows:

"The plaintiff, a sculpter, made a plaster bust of the deceased husband of the defendant, under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed it was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject; and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work, but by the nature of the material. Held that the plaintiff was not entitled to recover.

As the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable."

And in the opinion, the courts say, "Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is

wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. The simple inquiry is, what is the contract? And has the plaintiff performed his part of it? In this case, the plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she *would* be satisfied with. Nor is it sufficient to say that the bust was the very best thing of the kind that possibly could be produced. Such an article might not be satisfactory to the defendant, while one of inferior workmanship might be entirely satisfactory. A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied is quite another thing. The former can only be determined by experts, or those whose education and habits of life qualify them to judge of such matters. The latter can only be determined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound to it. McCarren vs. McNulty, 7 Gray, 139; Brown vs. Foster, 113 Mass., 136."

And Gibson vs. Cranage, 39 Michigan, 49, was an action to recover the purchase price of a portrait which an artist had made for a customer under an agreement that it need not be taken or paid for unless it was perfectly satisfactory to the purchaser. In did not prove to be such and it was held that the plaintiff could not recover, although the portrait was in all respects a perfect one. The court say, "The contract (if it can be considered one,) was an express

one. The plaintiff agreed that the picture when finished should be satisfactory to the defendant, and his own evidence showed that the contract in this important particular had not been performed. It may be that the picture was an excellent one, and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide the question. Where parties thus deliberately enter into an agreement which violates no rule of public policy, and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it."

Brown vs. Foster, 113th Mass., 136, was an action to recover the purchase price for a suit of clothes which it was agreed should be satisfactory to the purchaser, but which the purchaser refused to pay for, claiming that they were unsatisfactory. The trial court was of opinion and instructed the jury that the agreement amounted to no more than that the plaintiff was bound to make the clothes of the material ordered and in a workmanlike manner and to deliver them at the time agreed upon by the parties; and that if the plaintiff agreed to make the clothes to the satisfaction of the defendant, he was bound to do so with these qnalifications; and that if the clothes were of the character described, the plaintiff would be entitled to recover, although they were not satisfactory to the defendant.

The court held that this instruction was erroneous and that under the contract there could be no recovery unless it was shown that the defendant was satisfied with the clothes. The court say: "There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of

clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarially entered. McCarren vs. McNulty, 7 Gray, 139."

Singerly vs. Thayer, 108 Penn. State, 291, was a case in some respects very similar to the one at bar. The defendant Singerly was erecting a building in Philadelphia, and the plaintiff proposed to furnish him an elevator therefor by the following writing, which constituted the contract between the two parties.

"FIFTEENTH AND MARKET, PHIL., 8, 16, 1881.

WM. M. SINGERLY, ESQ.:

I propose to put my patent hydraulic hoist in your new building on Chestnut Street, (including a duplex pump worth $800,) according to verbal specifications given by

your architect, for $2,300, warranted satisfactory in every respect.

Yours,

ELI THAYER"

The elevator was furnished and put in the building pursuant to this proposition and remained there for about two months, but did not work in a manner satisfactory to the purchaser, who accordingly on the 18th day of April, 1882, caused the following letter to be addressed to the plaintiff by his foreman.

"PHIL., April 18, 1882.

"DEAR SIR: Mr. Singerly has made positive decision that he will not have your elevator in his building. He offers you $500 to take your work out at once, and you will please attend to the matter.

"Yours, etc., WILLIS G. HALE."

An action was thereupon brought to recover the contract price. On the trial, an inquiry was permitted such as was indulged in in the case at bar as to the character and construction of the elevator, and the skill and propriety with which it was managed, and as to whether or not it was in fact a machine adapted to the purposes for which it was intended, and one which properly adjusted and managed would operate satisfactorily.

And the court instructed the jury that the contract was not to be construed as saying that the machine should be satisfactory to the purchaser, but that it should perform its functions in a satisfactory manner, and that it was not intended that the defendant should be the exclusive judge of that; that the objection made to the elevator by the defendant seemed to have been that it did not run smoothly;

that it vibrated in the guides, and moved unsteadily, but that on the other hand the plaintiff testified that these defects, if they existed, could have been remedied very speedily, and at slight cost if he had been allowed an opportunity to do it; that at the time the defendant rejected the elevator it had not been completely finished and adjusted; and the jury were told that if such was the fact, and that they believed that such defects as existed might have been remedied by the plaintiff if he had been allowed to complete it and he was not permitted so to do, then they ought to return a verdict for the plaintiff. That they should decide whether it was built in a workmanlike manner and performed the purposes for which it was intended in a manner which ought to have been satisfactory to the defendant; or if there were defects, whether they could and would have been remedied by the plaintiff if he had been permitted to do so; and that in said case they should return a verdict for the plaintiff.

A verdict for the plaintiff was accordingly returned for the full amount of the purchase price, but upon appeal, the instructions were held erroneous and the verdict was set aside, the courts deciding in effect that upon the facts stated, there could be no recovery, saying, "The controlling question is what meaning and effect are to be given to the words 'warranted satisfactory in every respect?'"

"Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to the plaintiff in error, that was sufficient. In other words it may have been wholly unsatisfactory to him, yet if

the jury thought he ought to have been satisfied, he was bound to accept it. In effect that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called to pass on the rights of the parties."

"The proposition was made to induce him to purchase a kind of elevator not in general use. The fair inference is that he desired to procure one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. This then was the agreement. To him alone was the proposition made. It would not have been any clearer had it read warranted satisfactory to you in every respect. He therefore was the person to decide and to declare whether it was satisfactory. He did not agree to accept what might be satisfactory to others but what was satisfactory to himself. This was a fact which the contract gave him the right to decide. He was the person negotiating for its purchase. He was the person who was to test it, and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith."

"McCarren v. McNulty and others, 7 Gray, 139, was on an agreement to make a book-case, "in a good, strong and workmanlike manner, to the satisfaction of the president of the society" for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement without also proving that it was satisfactory to or accepted by the defendant."

"When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the

contract to prove he ought to have been satisfied. It was so held in Gray vs. The R. R., 11 Hun, 70, where the contract was for the purchase of a steamboat: In Brown v. Foster, 113 Mass., 136, when the agreement was to make a suit of clothes; In Zaleski v. Clark, 44 Conn., 218, on a contract for a plaster bust of the deceased husband of the defendant: In Ginson v. Cranage, 39 Mich., 49, where a portrait was to be satisfactory to the defendant, and in Hoffman v. Gallaher, 6 Daly, 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist under an agreement that they we e to be satisfactory, it was held, in Hartman v. Blackburn, 7 Pittsburgh Leg. Jour., 140, that he was made the exclusive judge of their value."

This opinion was re-affirmed in Krumb vs. Mersher, 116 Penn. State, page 17, which was a somewhat similar case. The contract in question in that case was for the purchase of a quarry and contained the following proviso: "Should the quarry prove a faifure, that no porceeds should be in hands of second party, or that they should abandon the quarry, believing that the quarry would not be a paying one or a profitable one to them in their estimation. And if the quarry had not netted any clear profit to the second party at abandoning said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect."

In an action for the purchase price, the plaintiffs contended that although the quarry, which had been worked by the defendants for a year, had not yielded them any net profit; that the reason it had not done so was because it had not been operated with ordinary diligence, business enterprise and capacity, and in a workmanlike manner, and

their evidece was permitted to go to the jury to show that if these conditions had been complied with, the operation of the quarry would have been profitable.

The court instructed the jury that these matters were proper to be inquired into, and that if they should find that the defendants when they gave up the lease, by ordinary business enterprise could have worked the quarry with a profit, and that it was not given up in good faith, the plaintiff would be entitled to the verdict; a verdict was accordingly returned for the plaintiff. The Supreme court held the testimony to have been improperly admitted, and the instruction of the trial court erroneous, and set aside the verdict, saying; "According to this view of the defendants' obligation, it did not depend in any degree upon their own estimation or belief as to their ability to work the quarry at a profit, nor even upon the actual results of the best and most faithful efforts they could put forth with whatever capital or facilities they posessed. Instead of that, the crucial test of liability as stated to the jury, was the *possibility* of the quarry being worked at a profit with ordinary diligence by anybody or by any means. That of course is a mere question of opinion to be proven by witnesses who would testify as to their belief on the subject, and who might thus induce a jury to find, according to their belief, as to what could be done with the quarry. Such opinions as this are easily obtained from willing friends of the interested parties, as unhappily the case in too many other kinds of cases. They cost nothing to the witness. He does not go through the hazardous ordeal of actually conducting at his own expense the practical operations concerning which he testifies. He ventures nothing but an opinion, and in that he assumes no risk. Upon reading the testimony in this case we find it was tried upon this principle precisely. Witnesses were

examined on behalf of the plaintiff to prove that the quarry could be worked at a profit and they gave their opinion to that effect. It was proved most clearly for the defence that in point of fact no profit was made, but on the contrary, a heavy loss, and there was no proof in the case that in reality any profit was made, yet the jury were instructed that if they found that the quarry could be worked at a profit, the plaintiff was entitled to recover. But the agreement provides for a very different standard of liability. The language is, 'Should the quarry prove a failure that no proceeds should be in the hands of the second party, or that that they would abandon the quarry, believing that the quarry would not be a paying one or profitable one to them in their estimation, and if the quarry had not netted any clear profit to the second party at abandoning said quarry, then the second party shall not be responsible for any further payment, and this agreement shall be null and void and of no effect.' All this verbiage simply means, that if Krum & Peters made no profit and believed that the quarry was not a profitable one to work, they could abandon the quarry and the contract was a nullity. In other words, the test of their right to terminate the contract, was the fact that they had made no profit, and their belief that the quarry was not a profitable one to work. It was conceded they had made no profit, and the proof was most ample that they believed the quarry to be an unprofitable one to work, and they did actually abandon it and surrender the lease. Now according to the terms of their contract they were entitled to have their liabiltiy tried by these tests. Did they make no profit and did they realy believe the quarry an unprofitable one? If so, they were not liable and there could be no recovery. They had an undoubted right to contract in that way if the other party were willing, as he certainly was:"

quoting from Singerly vs. Thayer, *supra*, and adding, "The foregoing reasoning applies with a still greater force to the present case. Krum & Peters were the persons who were to work the quarry: It was they who were to pay all the expenses and incur all the risk. This they must do in any event, and hence they would be most anxious to provide for a means of extrication from what might prove to be a ruinous loss. For that very reason they stipulated for an absolute privilege to terminate the contract if they made no profit and believed the quarry unprofitable to work. They did not choose to be subject to the opinions of others in this most important matter, and in this they were wise. Doubtless they knew, as nearly all men in the business world do, that the making of profits—on paper—is an affair of the simplest and easiest character. Thousands of men of good business capacity are being constantly led on to loss and great numbers to ruin, by the seductive array of profits, on paper, which are never realized Against the possibility of having their obligation to continue a losing contract, to depend upon the easily obtained and loosely formed opinions of strangers, they took care to provide by their agreement, and they are now entitled to the protection for which they bargained. Of course they could not from mere caprice and without reason say they were losing, and thus terminate the contract. But that is a very different matter from being obliged to submit to the mere opinion of strangers, whether witnesses or jurors, on the question of a possible profit in conducting their operations. These views sustain the second, third and fourth assignments of error."

And Gray vs. The Central Railroad Co., 11th Hun., 70, was an action upon a contract in the following language: "The Central Railroad Company of New Jersey offer to buy the steamboat, John Adams, from J. & R. I. Gray for the

sum of $15,600, cash, provided upon trial they are satisfied with the soundness of her machinery, boilers, etc., and the said J. & R. I. Gray agree to sell the above boat for the above price." And the court held that there could be no recovery unless it was shown that the defendants were satisfied with the boat; whether or not they ought to have been satisfied is immaterial, and in the opinion, the courts say, "If we regard the instrument as anything more on the part of the appellants than a mere offer to purchase at a stipulated price upon specified conditions, and treat it as an obligatory agreement binding them to purchase on certain conditions, it is then important to inquire whether, upon the evidence in the case, there was any breach of the agreement shown. The condition of the agreement, treating it as such, is expressed in these words: "Provided, upon trial, they are satisfied with the soundness of her machinery, boilers, etc." By this clause the agreement left it entirely for the defendants to determine whether or not they were satisfied. There is no reason in law why parties may not, if they think proper, make agreement of this kind. And in all cases where such agreements have been made, the determination of the party that he is not satisfied, and his refusal to accept and pay for the property, is conclusive and terminates the contract. In Ellis vs. Mortimer (1 B. & P., 257,) the plaintiff offered for sale a horse, and agreed to take for him a stipulated price, provided, the defendant, after thirty days' trial, should like the horse. Defendant took the horse for the purpose of trial, but within thirty days returned it, and refused to complete the purchase. It was held that there was no contract unless the defendant at the end of the period liked the horse: or in other words that the contract made him the sole arbiter of that question.

In McCarren vs. McNulty (7 Gray, 139,) the plaintiff

agreed to take a book-case, in a good, strong, workman-like manner, to the satisfaction of the president of the young men's society. He showed that the book-case was made according to the agreement in every particular, and asked the court to rule that if the jury were satisfied that if the work was done according to the contract and to the reasonable satisfaction of the president, that he should recover. The court ruled that the plaintiff must show that the work was actually satisfactory to, and accepted by, the president of the society, or he could not recover. On appeal, the court said: "It may be that the plaintiff was injudicious in agreeing to work for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval of a party in interest; but of that he was the sole judge. Against the consequences resulting from his own bargain, the law can afford no relief.

To the same effect are Aiken vs. Hyde (99 Mass., 18); Goodrich vs. Norwich (43 Ill., 336); Hunt vs. Wymen, (100 Mass., 198) Heron vs. Davis (5 Bosw., 336).

We are bound to regard this instrument as expressing precisely what both parties meant, which was nothing more than if the company on trial of the steamer, were satisfied with the soundness of her machinery, boilers, etc., they would purchase her for $15,000, and in that case, the plaintiffs would take that price for her: but if they were not satisfied, there was to be no obligation on the company to take her, and consequently none on the part of the plaintiffs to sell her to them. The trial was made, and there seems to be no conflict whatever in the evidence that the defendants were not satisfied and so notified the plaintiffs, and refused absolutely to complete the purchase. The attempt is now made to enforce the purchase by submitting to the jury the

question whether the defendants ought not to have been satisfied on the trial, or, in other words, to show that the soundness of the machinery, boilers, etc., was such as made the contract obligatory as one of purchase, whether the defendants were satisfied or not. This is a different contract from that which the defendants made and to which the plaintiffs assented.

The court submitted to the jury the question, in substance whether the declaration on the part of the defendants that they were not satisfied was made in good faith, saying to the jury: "The first question for you to consider is whether or not the defendants were justified in their refusal to take the boat. They were not absolutely and beyond all dispute bound to take the boat—not by the terms of the contract—not bound absolutely and unconditionally to take the boat in any event. But their refusal will only exempt them from liability if it was based upon their dissattion after the trial, with the soundness of her machinery, boilers, etc." And he adds: "After the examination and trial be defendant's agents, the president stated that Mr. Winents, who was defendant's engineer, and whom you will remember very well, had reported the boat as unsatisfactory in every respect. You are to be satisfied in order to justify the refusal of the defendants, that the boat was unsound in the respects indicated in the contract, and that the defendant's dissatisfaction, from the trial, was based upon such unsoundness. The examination and trial of the boat by the defendants, and her condition, you are to determine from the evidence. You will recall the testimony of the witnesses, and from that you will determine whether or not that boat was unsound. The defendants were not bound to take an unsound boat, and you are to determine from the evidence whether the boat was unsound. The contract in

question enables them to refuse the boat if they were dissatisfied with her on account of any unsoundness in her machinery, boilers, etc." He further says, in another place: "Allow me to ask you, upon this branch of the case, that you will give it a careful consideration, so as to determine the condition of the vessel when that contract for her purchase was made by the defendants."

These portions of the charge were excepted to. Their effect was to put the jury in the position in which the contract put the defendants themselves, and to allow the jury to say whether the defendants ought to have been satisfied with the condition of the boat as to her soundness in respect of the machinery, boilers, etc., when it clearly appears that they themselves declared they were not satisfied and would not proceed with the contract."

II.

But even if it had been alleged or indeed proven, that the plaintiffs did not "use fair and honorable means to satisfy themselves that the machinery was working to their entire satisfaction," whatever that means, or that the refusal to accept it was fraudulent, concerning none of which things is there a syllable of allegation or proof in the record, still no action could have been properly maintained for the sale and delivery of the property, because, at all events, there would have been no acceptance, and in its absence, the contract would have remained executory. This is one of the points ruled in both Michigan cases *supra*. The only maintainable action if any, in that case, would have been one to recover damages for fraudulently refusing to accept.

The case of Lynn against the Baltimore & Ohio Railroad Company, 60 Maryland, 404, was of this nature, and we wish to quote from the opinion in support of our contention that even in such an action, and more certainly in one

like the case at bar, the inquiry whether the property in fact possesses the qualities guaranteed by the contract of sale, is, standing by itself, wholly immaterial. That action, as stated by the opinion, was "brought by the appellant against the appellee, to recover damages for a breach of a written agreement by which the plaintiff contracted to furnish a certain quantity of ice to the defendant for the use of his road generally, and for his hotel in Cumberland. The contract is embodied in a letter from one N. S. Hill, the general purchasing agent of the company to the plaintiff, dated the seventh of December, 1880, which contains this provision: 'The ice to be good, clear solid stock, not less than six inches thick, subject to inspection and approval of the *agent* of the company selected by me.' In pursuance of this contract, Hill appointed J. F. Legge, the station agent of the company at Cumberland, to inspect and approve the ice: and plaintiff at sundry times after the ice season commenced, sent specimens of the ice he propose to furnish to Legge, who rejected the same, and no ice was ever, in fact, delivered. In his amended declaration, the plaintiff, after setting out the contract avers that, relying upon the same, he made all necessary arrangements for full and complete performance thereof, in the way of leasing land to work upon, and purchasing tools, which involved the expenditure of a large sum of money, and that at the first favorable ice season, which was some time in December, and from time to time to time thereafter, he requested the defendant to allow him to proceed to furnish and deliver the ice as he had contracted to do, and submitted samples of the ice to be inspected by the agent appointed by Hill, but said agent *fraudulantly rejected the same*." Upon the trial the following instructions were given to the jury, which the court held were proper:

"3. That it is not enough to establish fraud, that the evidence tends to show that Legge rejected the ice, which, in the opinion of the jury, he ought to have approved of; but it is incumbent on the plaintiff to establish his charge of fraud by clear and satisfactory evidence, that Legge disapproved of ice submitted to him, either by the procurement of, or in collusion with, the defendant, or from a design to injure, deceive or defraud the plaintiff.

"4. That according to the terms of the contract between the plaintiff and defendant, read in evidence, it was the duty of the said N. S. Hill to have appointed some agent of the company (defendant), to inspect and approve of the ice to be furnished by the plaintiff; and if the jury find that John F. Legge was selected and appointed by N. S. Hill to perform that duty, and that Legge was an agent of the defendant, and that Legge accepted the appointment, and undertook the duty assigned him, and that the plaintiff accordingly, from time to time, submitted to Legge specimens of ice for his inspection and approval: and further find, that he did inspect the ice offered by the plaintiff, for the acceptance of the defendant; but that he did not approve of such ice and rejected it; then, even though the jury may believe from the evidence that Legge unreasonably rejected the ice, the plaintiff cannot recover in this action unless that the jury find that the action of Legge in rejecting the ice offered was fraudulent or done in bad faith.

"5. But in order to find that Legge was guilty of fraud, or bad faith, in rejecting the ice as mentioned in the foregoing prayer, it is incumbent on the plaintiff to establish the charge of fraud, and by clear and satisfactory evidence; and it is not enough to establish the fraud charged, that the

jury may believe, from the evidence, that Legge rejected ice which the jury may believe he ought to have accepted, or that he rejected the ice which, in the opinion of the jury or others, corresponded in all particulars with that described in the agreement; but in order to maintain the charge of fraud under the pleadings and evidence in this case, the jury must find that the judgment and action of Legge was the result of fraud or bad faith, as described in preceding prayers."

And in the opinion, which is long and exhaustive, and cites several authorities in its support, the court say:

"It is not enough that the jury might *believe* from the evidence that Legge unreasonably rejected the ice, or that he was *grossly wrong* in his judgment, as stated in the plaintiff's third prayer; they must go further, they must actually infer and find fraud or bad faith. By this contract, which is perfectly lawful, the parties expressly agreed to submit the question whether the ice to be supplied was "good, clear and solid" to the judgment of this third party, and his judgment, no matter how erroneous or mistaken it may be, or how unreasonable it may appear to others, is conclusive between the parties, unless it be tainted with fraud or bad faith. To substitute for it the opinions and judgment of other persons, whether judge, jury or witnesses, would be to annul the contract and make another in its place."

And again. "Inspection and approval by the agent appointed for that purpose, is in this contract the condition precedent. This is so plainly apparent from the face of the contract itself, that no authorities to sustain the position need be cited. If, therefore, ice had been actually fur-

nished and delivered, it would have been incumbent upon the plaintiff to show that it had been thus inspected and approved, or to show some legal excuse therefor, before he could recover the stipulated price. So, if he seeks to recover damages for a breach of the contract, and founds his right upon the fact of a refusal of the agent to approve, he must show that the contract was, in law, broken by such refusal; in other words, that compliance by him with this condition has been unlawfully prevented."

III.

We suppose that the rule of law is now too well settled to be shaken, or to require an argument in its support, that a vendor of personal property, especially of machinery, who knows at the time of the sale that the vendee requires it for some special use or service, impliedly warrants that it is adapted to such purpose, and is liable for all damages resulting to plaintiff's business from its failure in this respect, or from its failure to meet the requirements of any other express or implied warranty. Such damages were evidently in contemplation of the parties when the defendant in error stipulated that upon being notified by the plaintiffs in error that the latter were not satisfied with the machinery. "Said Russell & Company must at once comply with the contract within sixty days. * * * and shall pay back to said Buckstaff and Utt all money paid to them, and said Russell & Company shall pay said Buckstaff and Utt such damages as shall be declared fair by competent judges; and after paying such damages, may remove said machinery without cost to said Buckstaff and Utt." Record, page 2.

Many of the authorities relative to the measure and extent of damages in such cases, are collected in Passenger vs. Thorburn, 34th New York, 634; Milburn vs. Belloni, 39 New York 53; Benton vs. Fay, 64 Illinois 417; The Railroad Company vs. Smith, 24 Wallace, 255.

Thus in Passenger vs. Thorburn, *supra*, it is held that where the defendant sold cabbage seed and warranted the same to produce Bristol cabbages, which warranty was untrue, the damages would be the value of a crop of Bristol cabbages, such as ordinarily would have been produced that year, deducting the expense of raising the crop, and also the value of the crop actually raised therefrom." Citing Bonadaile vs. Bruxton, 8 Term, Reports, 535, where the defendant sold the plaintiff a chain cable as a substitute for a rope cable of sixteen inches, for the use of plaintiff's ship, and warranted the chain cable to last two years. Plaintiff used the chain cable from time to time until it broke, which was within less than two years, whereby the chain cable and an anchor of the plaintiff, to which it was affixed, were lost, and it was held that the plaintiff could recover the value of the cable, and also of the anchor.

And Jones vs. Bright, 5th Bing. 533, which was an action for damages for breach of express warranty that copper sheathing for a ship would answer the purpose for which it was purchased, the court saying, by Best, Chief J.:

"In a contract of this kind it is not necessary that the seller should say: 'I warrant;' it is enough if he says the article which he sells is fit for a particular purpose. When Fisher, a mutual acquaintance of the parties, introduced them to each other, he said: 'Mr. Jones is in want

of copper for sheathing a vessel;' and one of the defendants answered: 'We will supply him well.' That constituted a contract, and amounted to a warranty."

And again, the Chief Justice observes: "If a man sells a horse, generally he warrants no more than that it is a horse: the buyer puts no questions, and perhaps gets the the animal cheap; but if he asks for a carriage horse, or a horse to carry a female, or a timid or infirm rider, he who knows the qualities of the animal and sells, undertakes on every principle of honesty, that it is fit for the purpose intended. The selling upon a demand for a horse with particular qualities, is an affirmation that he possesses these qualities. So, it has been decided if beer be sold to be consumed at Gibralter, the sale is an affirmation that it is fit to go so far."

And Brown vs. Edgerton, 2 Man & Gran., 279, which was an action to recover damages for the breaking of a rope which had been bought for the purpose of hauling up and letting down pipes and other heavy casks, and by the breaking of which the plaintiff had lost a pipe of wine, it was held that the plaintiff could recover the value of the wine.

And Randall vs. Roper, 9 English Common Law, 82, which was an action for a breach of warranty upon the purchase of thirty quarters of seed barley, that the same was Chevalier seed barley, but which was barley of an inferior quality, it was held that the plaintiff could recover the difference between the value of a crop of Chevalier barley and the grain that was raised.

And Smead vs. Ford, 102 English Common Law, 612,

where the defendant failed to deliver a threshing machine according to contract, which he knew that the plaintiff required for the purpose of threshing wheat in the field, it was held that the plaintiff could recover the damages resulting from the loss of the wheat which was stacked in the fields, and on account of the failure to deliver the machine, was destroyed by rain. The court also citing several other authorities to the same effect; and an almost unlimited number of them could be collected from the books.

The testimony given by the plaintiff Utt, which was stricken out and withdrawn from the jury by the order of the court, Record, page 39, was concerning exactly the same character of damages as those allowed to be recovered for in cases cited. The witness said: "When our mill was erected we made contracts with different parties to put in certain machinery. In cutting straw there is a large amount of steam required. We purchased from Neill patent boilers at an expense of five thousand dollars, to be cooked with steam coming from the boilers; that was the proper way to do it; but lack of steam in the plant that we purchased made it impossible for us to cook this straw in these boilers; so, after trying six or eight weeks to do so with this steam, and succeeding very poorly, we took the steam from the escape system that we had made in connection with the big engines, and since that time we have been using that steam; but it does not cook the straw well, because the water condenses in these globe bleachers and has to be let out, and with them the liquor passes out that the straw is cooked in, and it makes an uneven cooking of the straw; it is not uniform. The straw is frequently tough, so that we take it over to the grinding machine, where it is ground up. Instead of grinding it up in two

hours and a half or three hours, it takes from four to four and a half to get it in proper shape."

Now, it will be remembered that it is admitted that the contract required three boilers, of eighty horse power each, and that the record shows conclusively on pages 32 and 33 that the three boilers furnished were at least 34½ horse power less than guaranteed; and also that the continued attempt to use this machinery was persisted in, at the request of the defendant in error. So that the lack of steam, concerning which the witness testified, and the consequent damages from the additional time consumed, and the reduction in quantity and deterioration in quality of the product of the factory, about which the witness testified, were the direct results of a breach of the contract in this particular. Manifestly, it seems to us, the witness ought not only to have been permitted to testify concerning these matters, but also to state the capacity of the mill, the degree to which its output was diminished from these causes, and the difference between the value of the paper manufactured, considering its quality, and the value of that which would have been manufactured had the requisite quantity of steam been provided. And it is very clear also, in the light of these authorities, that this witness ought to have been permitted to answer the question set out in the second assignment of errors, and on page 38 of the record, namely: "What conversation did you have with him (Mr. Giddings, the agent of the defendant in error), if any, about the purpose for which the machine must be used and the necessity for steam capacity in the boilers?"

It seems very clear to us, therefore, in the light of the foregoing reasons and authorities, that the objection that

the petition did not state a cause of action, ought to have have been sustained, and that the plaintiffs in error have been injured by erroneous rulings at the trial:

First. To the amount of the recovery, $4,550.00.

Second. By being deprived of their item of set-off for money advanced, being $690.68. with interest to date of trial, making $747.08, and making a total of $5,297.08.

Third. In addition to the foregoing, to such damages as they had suffered by reason of the transaction, and as were contemplated by the contract, which were alleged in the answer to have been ten thousand dollars, and which, as we before said, we believe reached that sum, and for which plaintiffs in error were entitled to a verdict and judgment.

JOHN H. AMES,

Solicitor for Plaintiffs in Error.

FILED.
JAN 4 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

Term No. 207.

JOHN A. BUCKSTAFF AND JOHN UTT,
Plaintiffs in Error,

v.

RUSSELL & CO.,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

T. M. MARQUETT,
Attorney for Defendants in Error.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB

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TERM NUMBER 207.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

The plaintiff in error, the defendant below, brought his action upon the following contract, also exhibits made a part of that contract:

"This agreement, made and entered into this 22d day of June, A. D. 1888, by and between Russell & Co., of Massillon, Ohio, by its agent, H. W. Young, party of the first part, and J. A. Buckstaff and J. E. Utt, parties of the second part,

"Witnesseth, That the said Russell & Co. agree to furnish the following machinery, delivered on cars at Lincoln, Ne-

braska: Three (3) boilers, 60 inch x 14 feet; one (1) automatic cut-off engine, 125 horse power; one (1) automatic cut-off engine, 50 horse power; one (1) Gordon Maxwell duplex pump; one (1) Garfield injector; one (1) heater, and any necessary fittings of sufficient size and dimension to properly run such plant; also, two (2) smoke-stacks 32 inch diameter, 60 feet long, made of No. 12 iron with fancy tops, guy rods and stays. Hereto attached and made a part of this contract proposals marked Exhibits A, B, C, and D, For and in consideration of and in payment for the same, the said J. A. Buckstaff and J. E. Utt agree to pay four thousand nine hundred and fifty dollars ($4,950) as follows: One-third cash when machinery is steamed up ready to run, the balance in six (6) and twelve (12) months, with interest at the rate of 7 per cent per annum from time of erection in Lincoln, providing that with proper and careful management, said engines, boilers, and pumps are hereby guaranteed to work, and that said engines do give the amount of horse power as herein specified, and to be as economical of fuel and as durable as a Corliss non-condensing engine. It is also understood and agreed that said Buckstaff & Utt shall use fair and honorable means to satisfy themselves, before payments are due, that said engines, boilers, and pumps are working to their entire satisfaction, and should they not be, then, in that event, the said Buckstaff & Utt are to notify said Russell & Co., and said Russell & Co. must at once comply with the terms of this contract within 60 days, and in the event they do not, the said Buckstaff & Utt may declare this contract paid in full, or said Russell & Co. shall pay back to said Buckstaff & Utt all money paid to them, and said Russell & Co. shall pay said Buckstaff & Utt such damage as shall be declared fair by competent judges, and after paying such damages may remove said machinery without costs to said Buckstaff & Utt.

"It is hereby agreed that said Russell & Co. shall ship said machinery not later than July 15th, 1888. This contract signed in duplicate.

"(Signed) RUSSELL & Co.,
"E. C. HARRIS, *Manager.*
"J. A. BUCKSTAFF.
"J. E. UTT."

EXHIBIT "B."

"LINCOLN, NEB., June 21, 1888.

"To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

"We propose to furnish you three 80 horse power boilers, as described below, to be delivered f. o. b. cars at Lincoln, Neb., boilers to be of the return tubular type, 14 feet long outside and 60 inches diameter, to contain 46 lap-welded tubes 4 inches diameter, 14 feet long; shell plates to be eleven thirty-seconds of an inch thick; heads to be seven-sixteenths of an inch thick, of flange steel, having a tensile strength of 55,000; dome to be 30 inches high and 30 inches diameter; all girth seams to be single riveted, horizontal seams double riveted, heads thoroughly braced.

"Boilers to have manhole in rear head above the tube and hand hole in the front head below the tubes, each to be supplied with suitable plates, yokes, and bolts.

"Boiler to have two cast iron lugs on each side, to be provided with full front, double fire, and ash doors, grate bars and bearers, back wall plate, wall binding bars, and anchor rods, cleaning door and frame, safety valve, combination water columns with steam gauge, gauge glass, and gauge cocks, whistle, blow-off, check and stop valves, 2 stacks, 32 inches diameter, 60 feet long, made of No. 12 iron, and two sets of

guy rods of sufficient dimensions for plant, breeching in place of stacks, steam drum connections on main stack.

"All boilers tested to 150 pounds hydraulic pressure; workmanship and material guaranteed to be first-class; plans for setting boilers to be furnished without expense to purchaser.

"Price for the above described boiler, ——."

EXHIBIT "C."

LINCOLN, NEB., June 21, 1888.

"To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

"We propose to furnish you in good shipping order, f. o. b. cars Lincoln, Neb., one right-hand automatic cut-off engine, cylinder 14 inch diameter by 20 inches stroke, with main bearings 6½ by 12½ inches long; one balanced fly-wheel, 72 inches by 16 inches face, to run over at speed of 200 revolutions per minute; 125 H. P. is guaranteed on a maximum pressure of 80 pounds steam inch boilers; main shaft, connecting and piston rods to be made of steel; main bearings, cross-heads, and wrist-pin brasses and shoes of cross-heads to be lined with best quality of nickel babbit.

"Throttle-valves fitted to steam chest; full set index lever sight-feed oil cups, grease cups, and cent. oiler, exc. aut. sight-feed lubricator; full set wrenches, foundation bolts, and anchor plates.

"We will furnish full plans for erecting foundation; also ten plate for foundation bolts, if ten plate is wanted, in advance (also foundation bolts) of shipment of engine; the freight or express thereon to be paid by purchaser.

"We guarantee the above engine to be well made, of first-

class material, and in operation to work as economically as any similar engine in market.

"Above described engine complete, with coping stones for both engine and pillow block, ——."

Exhibit "D."

"Lincoln, Neb., June 21, 1888.

"To J. A. Buckstaff and J. E. Utt, Lincoln, Neb.:

"We propose to furnish you in good shipping order, f. o. b. cars Lincoln, one right-hand automatic cut-off engine, cylinder 9 inches diameter by 14 inches stroke, with main bearings 4 by 7½ inches long; one balanced fly-wheel, 54 inches by 13 inch face, to run over at speed of 260 revolutions per minute; 50 H. P. is guaranteed on maxims of 80 pounds steam inch boiler. Main shaft, connecting and piston rods to be of steel. Main bearings, cross-head, and wrist-pin braces and shoes of cross-head to be lined with best quality of nickel babbit. Throttle valve fitted to steam chest; full set index-lever sight-feed oil cups, grease cups, and centrifugal oiler on crank wrist; automatic sight-feed lubricator; full set wrenches, foundation bolts, and anchor plates.

"We will furnish full plans for erecting foundation; also ten plate for foundation bolts, if ten plates are wanted, in advance (also foundation bolts) of shipment of engine, the freight or express thereon to be paid by the purchaser.

"We guarantee the above engine to be well made, of first-class material, and in operation to work as economically as any similar engine on the market.

"Above described engine complete, with coping stones for both engine and pillow block."

PLEADING.

The plaintiffs below in their petition and supplemental petition allege that they in every respect have done and performed their obligations to the defendant arising out of said contract and have fully complied with the strict letter of said contract. Their first answer to the causes of action in plaintiff's petition is a special denial, and for *fifth defense set up a counter-claim*.

First—They allege that the plaintiffs below, in pretended compliance with said contract, furnished and erected in said mill, three boilers of the capacity not exceeding 65 horse power each, and one engine of 125 horse power, and one of 50 horse power, and that said engine and boiler at all times used and consumed, in the performance of the work of which they were capable, not less than fifty per cent more fuel than should be consumed in the performance of the same work by a non-condensing Corliss engine.

Second—And the defendants below say that said plaintiffs furnished to the said boiler and engine defective and insufficient grates, fixtures, and appliances therefor, so that the same were for a long time less capable and effective than they would otherwise have been.

POINT FIRST.

Defendants in error claim *that the* CONTRACT WAS *substantially performed by them*, and that the guarantees were made good, which are as follows:

1st. Providing that with proper and careful management said engines, boilers, and pumps are hereby guaranteed to work.

2d. And that said engines do give the amount of horse power as herein specified.

3d. And to be as economical of fuel and as durable as Corliss non-condensing engines.

First—It is claimed that the boilers furnished were not 80 horse power boilers. But we note that there is no guaranty as to that in the contract. However, in Exhibit B, attached to the contract, three 80 horse power boilers were to be furnished. Note that the engine was only 175 horse power and that the horse power of the boilers, they being much less than 80, would be sufficient to run it.

But secondly, admitting that the contract requires us to furnish 80 horse power boilers, and there is nothing in the evidence to show but that the same were furnished, it is true that in the second subdivision the highest capacity of the boiler as shown by the testimony was 68½ horse power. It was agreed that by the recognized standard of measurement for determining the capacity of boilers, the power of said boilers could readily be determined by the surface dimensions of the tubes and the end of the boilers thus furnished. But the plaintiffs in error ordered the boilers to be furnished with tubes of 3½ inches in diameter, according to the plans furnished by the parties furnishing the paper mill plant, whilst the proposal referred to tubes 4 inches in diameter. The plaintiffs in error ordered tubes less than we proposed to give, and thus prevented any fair test. The fact that the capacity with tubes 3½ inches in diameter made the capacity 68½ is no reason why if they had tubes 4 inches in diameter it would not have been an 80 horse power.

Second—When the test was made the 50 horse power engine was being operated at 15 horse power and the 125 horse

engine was operated at 80 horse power. In other words, that was all the power they wanted to run their plant; or that was the power they were running their plant with, and the 68½ horse power of boilers would furnish more than enough to run it at its full capacity. The evidence certainly sustains the guaranty that said engines do give the amount of horse power as herein specified. As to the engine being as economical of fuel and as durable as a Corliss non-condensing engine, the test showed that the amount of water, with an actual and practical quantity of water used in relation to effective force, developed 33 1-10 pounds per horse power per hour. The evidence tended to show that a Corliss non-condensing engine in practical use and operation consumed on an average 40 pounds of water per horse power per hour.

There was evidence showing the defects in the foundation work and the erection, and the defendant offered evidence tending to show that plaintiffs in error used a poor quality of coal, it merely being slacked and of so fine a quality that it packed up, and the fire was improperly tended by the fireman, which injuriously affected the ability of said machinery to develop effective force economically, and as to the latter matter the evidence was conflicting.

The evidence further tended to show that the grate used in said machinery was a rotary grate with spaces in the grate made for the use of large sized coal; that this grate was specially ordered by the defendants, and that the kind of coal used in this grate was not such as was adapted to the grate, nor was the coal of proper quality to use in the operation of such machinery. The evidence was conflicting. The tendency of the whole evidence was, that if the proper machinery, proper horse power used, proper grates and proper fuel properly used, the machinery would have worked as per the agreement; hence a substantial compliance with the con-

tract. The question as to whether the machinery was as GUARANTEED was fairly submitted to the jury.

COUNTER-CLAIM OF DEFENDANTS.

POINT SECOND.

I.

The plaintiffs in error sent a letter (see page 36 of printed record), in which they say: "We now request a compliance with the terms of the contract on your part—payment of the damages we have sustained and a removal of the machinery as provided by your contract. We are duly damaged by the excessive increase of the fuel consumption and the quantity of water required to be converted into steam to propel this machinery, as well as being greatly hindered and delayed in our manufacturing industry." The company, being satisfied that the machinery came up to their guarantees, and having no damages particularly pointed out, simply refused to comply with that request. The plaintiffs in error meanwhile using the machinery, and are still using it, for that matter, delivered to them by the plaintiff, the question arises, can they, after receiving this machinery for nothing, not having paid a cent upon it, and still holding possession and using it, and over and above the facts that they have not paid a cent upon the machinery, get damages because the machinery uses more fuel or water than they think necessary and they do not get as good an outcome. On all the evidence the questions as to the excessive increase of fuel, consumption of quantity of water required to be converted into steam, as well as being hindered and delayed in their manufacturing industry, and the failure of the machinery furnished to perform as required, have all been fairly submitted to the jury, and they have found in favor of the defendants in error.

And now the question arises whether the court erred in ruling out the evidence of the witness Utt.

The questions were propounded to defendant Utt: Who did you and Mr. Buckstaff first commence negotiations with for the purchase of these boilers?

A. With Mr. Giddings.

Q. As representing whom?

A. Russell & Co.

Q. When was that?

A. I think it was in April, 1888.

Q. What conversation did you have with him, if any, about the purpose for which the machine must be used and the necessity for the steam capacity in the boiler?

Question not allowed. This was clearly right, because this was before the written agreement was entered into, and the capacity of the boilers is there set forth, and the whole is in writing; parol evidence therefore is not admissible to contradict or vary it, nor add to it.

Q. You may state in what your damage consisted, and the amount, in consequence of the defective construction and the failure of this machinery to perform its labor and the labor required of it by the terms of the contract from the time of its erection up to the first day of March?

This question was objected to, as incompetent, irrelevant, and immaterial, and as invading the province of the jury. It might have been added, the province of the court too, because the witness is asked to determine in what manner the machinery failed to perform the labor required of it by the terms of the contract from the time of its erection up to the

first day of March. He is to determine the amount of the damages, which was properly a question for the jury.

The next question is objectionable: You may state what damages you sustained in consequence of the failure of this machinery to do the work at the paper mill.

The witness is asked for no fact, but simply to give his conclusion and opinion; seeks for no fact. The question of what damage was sustained was a question *for the jury*.

Wood v. Arthur, 16 S. E., 843.

Best on Evidence page 512, lays down the rule: "No question is competent which puts the witness in giving an answer to it in place of the jury, and substitutes his opinion for theirs; or offers his opinion for their adoption upon a matter involved in the issues."

But further, as we shall hereafter show, the question which had reference to the damages by a greater consumption of coal, and by lack of power by which the output was lessened and the quality of the same deteriorated, calls for damages speculative and remote and which are not recoverable, as will hereafter more clearly appear in the argument.

II.

The plaintiffs in error in their answer allege or admit, which answer was filed more than one year after this machinery was steamed up and used for work, which says "Notwithstanding the said machinery HAS AT ALL TIMES BEEN AND NOW IS PROPERLY AND CAREFULLY MANAGED BY THESE *defendants*, the said engines and boilers do not give and have not given and are incapable of producing the amount of horse power specified in said contract, and are not and have not at

any time been as economical of fuel as the Corliss non-condensing engine." According to their own admissions or statements, the proper measure of damages would be, how much less is the machinery furnished by plaintiffs worth than it would have been had it been in accordance *with the* GUARANTY *as* MADE *by defendants in error.*

As far as the warranty or guaranty in reference to the machinery using more fuel than the Corliss engine or in reference to it not having power enough to do the work, and diminution of output and quality of the same, the PLAINTIFFS IN ERROR STILL USING *the* MACHINERY, the damages are laid down by the Nebraska court to be about this: "In an action for damages for the breach of warranty as to quality of personal property sold, where there is no rescission of the contract, THE MEASURE OF DAMAGES IS THE DIFFERENCE BETWEEN THE VALUE OF THE PROPERTY AS IT ACTUALLY WAS, *and* WHAT WOULD HAVE BEEN ITS VALUE HAD *it* BEEN *as* REPRESENTED *at the time the* REPRESENTATION *or* WARRANTY WAS MADE.

Young v. Filley, 19 Neb., 543.
Markell v. Moody, 13 Neb., 323.
Brown v. Rodgers Bros., 20 Neb., 547.

I understand this to be the *rule* IN ALL COURTS.

III.

There has been no rescission of the contract by plaintiffs in error.

The evidence showed clearly that the plaintiffs in error still retained and used the property and had the use of the property up to the time of trial; and even up to the present time.

In the case of Gale Suttler Harrow Manufacturing Co. v. Moore, 26 Pac., 703, supreme court of Kansas, decided May 9, 1891, the court hold in a case where a man furnished a seeder, with a warranty that it was well adapted to the work of seeding ground, and that the workmanship of the same was first-class in every particular, and that it would do the work in a satisfactory and farmer-like manner; the defendant alleged that these representations were untrue, and that the implement was inferior in quality, unfit for the purpose for which it was purchased, and wholly worthless; but he also alleges that he gave plaintiff due notice of the failure of the machine, and that it is now on his farm solely and exclusively to the order of the plaintiff. There is a further allegation that by reason of the breach of the warranty the defendant suffered to the extent of $405. It will be noticed in the case at bar that the plaintiffs have never rescinded the contract any farther than was done in this case, and the court say on page 704: "In order, however, that the purchaser be entitled to rescind the contract he must return the property; would have to return it within a reasonable time; HE CANNOT RETAIN AND USE THE PROPERTY AND AT THE SAME TIME SAY HE REPUDIATES AND RESCINDS THE CONTRACT OF PURCHASE.

Cookingham v. Dacy, 11 Kansas, 229.
Altman v. Mickey, 41 Kansas, 248.

The court further say: "Within the authorities cited it must be held that the continued use of the implement, after learning of the alleged defects, should be regarded as a waiver of defendant's right to rescind, and that the offer to return was not made within a reasonable time."

The court further say: "But after he ascertained that it would not do the work and was wasting the seed, he should

have ceased its use and cannot *recover for the loss of seed*, labor, or land which was used or employed after the time." *This position* PLACES THE QUESTIONS OBJECTED to in a stronger light, for every one of these questions asks the witness to detail his damages after as well as before the time of the rescission of the contract on the 11th of February, and we are brought back to the proposition that the only damages that the defendants could sustain in a counter-claim, having retained and used the property, would be the difference in value between the property they so held of defendants in error and used and what it would have been had it been as good as the warranty or guarantee which defendants in error gave them. On that proposition see Ogden v. Beatty, 137 Pa., 197.

Aultman v. Ginn, 48 N. W., 336, Sup. Ct. S. D.
See McLean v. Clapp, 141 U. S., p. 429.

In the case of Nye Goody Co. v. Iowa City Alcohol Works, 51 Iowa, 129, the court lay down the rule "Where machinery is purchased with warrant that it is in perfect order, and the vendee receives it and puts it in operation with full knowledge that it is defective, he is not entitled to recover damages for the breach of the warranty. The measure of damages for the breach of such a contract or warranty would be the difference between the value of the use of the machinery as it would have been if it had been as represented, as the value of its use as it really was."

IV.

But if it should be claimed that by the letter of the 11th of February the plaintiffs in error rescinded the contract, yet the damages for the wasteful consumption of fuel, and lack of power, and the consequent loss of time and labor, the diminu-

tion in quantity and deterioration on quality of output, resulting from the non-compliance of plaintiff with said contract, for which $10,000 is claimed for damages, or for profits which could have been obtained if the machinery had been properly furnished, ARE REMOTE AND SPECULATIVE RATHER THAN DIRECT AND IMMEDIATE.

See the case of Howard v. Sweetwater & Bierce Mfg. Co., 139 U. A., 203–209. We think this is a case in point. In that case the court refers to Pennypacker v. Jones, 106 Pa. State, 337–342, which seems to be a case something like the one at bar. "In that case the plaintiff, who owned and operated a flour mill in Philadelphia, entered into a contract with the defendants by certain terms of which the defendants were to place in their mill, within a specified time, machinery of a certain capacity to make flour of a high grade. The machinery when furnished was found not to make a high grade of flour and to be incapable of producing the stipulated number of barrels per day. In an action for damages by the plaintiff for breach of the contract it was held that the loss of possible profits which could have been made if the mill had run properly was not a proper subject for damages, for the reason that such damages were too remote and speculative."

Bridges v. Lanham, 14 Neb., —.
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The general damages in the counter-claim could easily have been prevented by the defendants quitting the use of the machinery, and hence cannot be recovered.

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The theory of the counter-claim is that the plaintiffs in error may consider the machinery furnished to them as worthless, hold the same and use it, and then make plaintiffs pay damages because it consumes more fuel than was guaranteed, and because the output and the quality of the output would be less.

If it is an injury to them to use it, and no benefit, they could easily prevent the loss by quitting its use. If the use is all loss and no profit (for that is the theory of the counter-claim), the plaintiffs in error can save themselves from the loss arising from the breach of the contract by simply quitting the use of the property, for their theory is that it is all damages and no benefit for them to run the machinery as it is, and therefore we think the principle laid down in Warren v. Stoddard, 105 U. S., page 229, is good law: The rule is that where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense, or with reasonable exertions, it is his duty to do it and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent.

See Wicker v. Hoppick, 6 Wall., 94.
Russell v. Butterfield, 21 Wendell (N. Y.), 300.

VI.

The contract is a peculiar one; but there is nothing in that portion of it which says "And said Russell & Co. must at once comply with the terms of this contract within sixty days; and in the event they do not, the said Buckstaff & Utt may declare this contract paid in full." That of course they did not do. "Or, said Russell & Co. shall pay back to said Buckstaff & Utt all money paid to them; and said Russell

& Co. shall pay said Buckstaff & Utt such damages as shall be declared fair by competent judges; and after paying such damages may remove said machinery without cost to said Buckstaff & Utt." But that was not done; neither party has complied with these two requirements of the contract; hence the interpretation of the contract is to be upon general principles of law that govern where a party guarantees or warrants machinery to do certain work and it is claimed by one party that it does not do that work.

POINT THIRD.

The verdict being for less than $5,000, and as we think the amount in dispute less than that, this court does not have jurisdiction of this case.

New England Mortgage Co v. Gay, 145 U. S., 123.
St. Louis R. R. Co. v. McBride, 141 U. S., 127 and 206.

T. M. MARQUETT,
Attorney for Defendants in Error.